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THE ECONOMIC PURPOSE OF ANTITRUST LAWS
Thurman Arnold

THE CHARACTER OF A LAWYER IN THE COMMUNITY
Charls B. Taft

FEDERAL CROP INSURANCE: ANOTHER CUP OF HEMLOCK?
Herman B. DeCell

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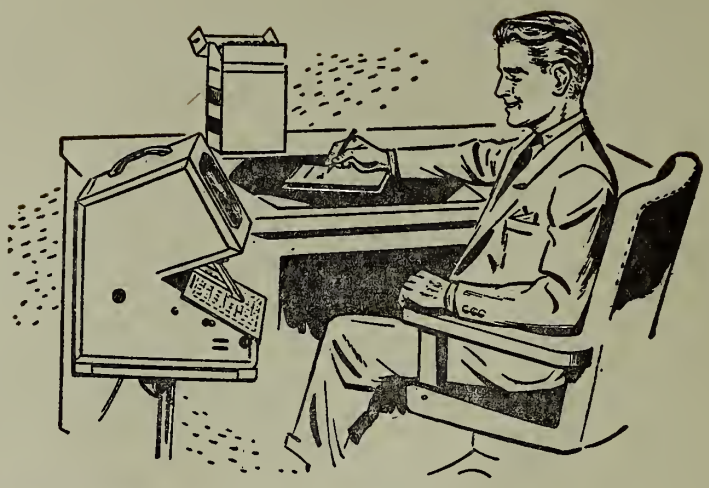

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Mississippi Law Journal

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THE ECONOMIC PURPOSE OF ANTITRUST LAWS†

*Thurman Arnold**

The antitrust laws are the cornerstone of our economic philosophy. We are the only country in the world which has made it a crime for businessmen to impose restraints on trade and commerce. As a result the antitrust laws have had a truly profound effect on the development of the nation's trade and economy, an effect which makes our economy unique in the world—and also somewhat baffling to American students.

This is in spite of the fact that for long periods there was no enforcement. The Sherman Act got off to a bad start by the extremely narrow construction handed down by the Supreme Court of the United States in its early years.[1] Under the impact of the so-called "rule of reason" and for other causes, the Government practically ignored the Act from the end of the First World War to the depression. Appropriations to the Department of Justice during this period for enforcement were so small that effective compliance was impossible. As a result, the vast concentrations and mergers developed which ended in the stock market collapse of 1929.

The lessons of this period are worth study. The first victims of the failure to enforce the antitrust laws were the farmers. They were powerless in the face of the growing industrial concentration, since concentration in agriculture is practically impossible. They bought in a closed market and sold in an open market. The economic force of supply and demand affected the prices they received in the world markets for their produce; it did not affect the control of the manufacturing combinations over the prices of factory-made goods which the farmers bought.

Thus, as early as 1924 the failure to enforce the antitrust laws began to appear throughout United States agriculture. Banks failed in the West and South. Agricultural areas were steadily losing purchasing power and economic independence. During the 1920's there grew up a

†From an address at the University of Mississippi, March 14, 1955.

*Attorney at Law, Arnold, Fortas and Porter; Washington, D. C. Assistant Atty. Gen., Anti-Trust Division, 1938-1943.

[1]Standard Oil Co. v. United States, 221 U.S. 1 (1911). *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

system of absentee ownership. The West and the South were becoming colonies of the industrial East. I can illustrate what happened by my own experience. In the small Western town in which I practiced law before the depression, I had as clients a motion picture theatre, a small oil refinery and a concern which manufactured plaster from a gypsum deposit. All these at the time were owned by local businessmen; they had been originally financed by local money and conceived by local ingenuity. But by the time I left for the East the refinery had been purchased by one of the Standard Oil Company affiliates and closed down; the plaster company was still operating but had been acquired by an Eastern firm; the theatre owner had been forced to sell his theatre as a result of the conspiracy between the principal motion picture producers which denied him the pictures he needed.[2] Today my old home town is absentee-owned. The nickels and dimes and dollars of its citizens do not remain to build up local wealth and local purchasing power. They are siphoned off to the Eastern corporations.

The 1929 depression illustrates what happens when this kind of development is multiplied to national proportions. Farmers stop buying; businessmen in small towns have to stop buying; men are then laid off in the Eastern factories and they, in turn, stop buying. The spiral begins, ending in the collapse of our entire credit structure.

The most significant evil at which the antitrust laws are aimed is the evil of absentee ownership and industrial concentration that makes for such depressions. We were slow to learn after 1929 that great corporate organizations cannot continue to take money out of local communities without somebody putting it back. That somebody, in an emergency, is the Government. We understand this today and so the Government is prepared to spend money to avert such a slide again if it ever happens. But Government spending is always unsatisfactory. It does not create economic relationships; it is economically inefficient; and it cannot spend wisely because it is not directed by the forces of competition. It puts money in the wrong places and at the wrong time. It is, therefore, only a last resort. We should not be afraid to use it but we should not count on it as any real solution. It is the function of private purchasers, of corporations and small businesses to direct the flow of money in a competitive society. This is not the business of Government except when the economy is sick.

With this in mind I would suggest that the most significant evil against which the antitrust law is supposed to stand is the evil of absentee ownership. This is true at home and abroad. Take the position of the farmers as an example. They are piling up huge surpluses while in vast sections of the world people are living in a state of near starvation. There

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[2]See *United States v. Paramount Pictures*, 334 U.S. 131 (1948).

are no surpluses in terms of human need. The reason is that these people have no money with which to buy. Mr. Dooley once said that the root of the money problem was the fact that people who need money the worst do not have it. It has been practically impossible to induce American capital to invest in the shares of foreign corporations. Countries such as Italy and Greece have been unable to obtain the equity capital. Concerns of the approximate stability of General Electric in their own countries have been paying ten to twenty percent. Private industry abroad has been handicapped by the absence of foreign capital. Private industry in America has not exported capital abroad. And so our foreign trade languishes and farm surpluses build up.

It is no answer to say that parity prices should be abolished and farmers forced to compete. That is the proper principle when the free markets of the world are open to farmers. It is the principle which it is impossible to apply when these markets are closed. To a superficial observer our program of parity prices is the antithesis of the ideal of the Sherman Act. If we take a broader view, however, we are forced to realize that to take out the support from farm prices under the present conditions would only mean that Government money would have to pour in vast quantities into the farm belt.

We repeat, the first economic objective of the antitrust laws is to prevent the rise of absentee ownership—to encourage the export of capital to outlying areas instead of draining it off.

The second most important problem which faces those who enforce the antitrust laws is the problem of size. Any program which penalizes growth spells stagnation. Merely because an industrial giant is big is no reason for preventing it from growing even bigger provided its growth is along the right lines. The only kind of growth which the antitrust laws should inhibit is growth through the absorption of local enterprises and the draining off of local capital. When United States Steel builds new plants and increases its efficiency and the volume of its production through the process now called automation, it is performing a service to a competitive economy which only a concern of tremendous size can do. When it uses its power over the product which it manufactures to make nails in Pueblo, an operation which does not need great size, it is robbing Colorado of its purchasing power, a process which if continued long enough will make it close down its own plants as happened in the 1929 depression.

This simple economic fact has not yet been learned by American business men or the professional lawyers who are so skilled in the leading cases in the field. They are all intent upon discussing the antitrust laws as a series of dry, fixed and definite rules. They continually cry that what is needed is certainty in enforcement. They want to be able to

predict with precision what the Sherman Act means for all time. But there can never be certainty in enforcement. The antitrust laws are a charter of economic freedom. Enforcement must necessarily be something like the case-by-case development of the "Due Process Clause" of the Constitution. It must be adaptable as the economy and industrial practices change.

The recently published Report of the Attorney General's National Committee to Study the Antitrust Laws is an example of what happens when those who study or suggest legislation in the antitrust field fail to realize this. It is dry and meaningless. It contains all the cases, but these cases are discussed apparently on the assumption that they were all decided by the same term of the Supreme Court of the United States under precisely similar economic conditions. There is no comprehension of the economic background of the decisions, and so no constructive suggestion that changing conditions and industries require changing standards of enforcement.

In fact, the problem of size and absentee ownership is rapidly changing under the great industrial revolution of the twentieth century. I would like to discuss this change, and suggest some of its implications for our antitrust policies.

At the outset it is necessary to understand what the real wealth of nations is today and how it differs from the wealth of the nineteenth century. Today it is *organization* rather than *goods* which constitutes our wealth. To illustrate this I am going to quote from an article I wrote some years ago in *Collier's*.

"In the nineteenth century, so-called capital goods—machinery, ships, railroads—were the principal assets of a nation. They no longer are. Our vast productive capacity comes primarily not from material things but rather from the modern art of industrial organization. That art is America's distinctive contribution to the twentieth century industrial revolution.

"The great American business enterprise is a revolutionary new technique of co-ordinating men, materials, machinery, science and psychology. This mighty complex of conditioned reflexes, once perfected, rolls along independently of personalities, functioning almost automatically. Great business organization has acquired the enduring character and the respect which has been heretofore commanded by such institutions as universities. The modern American business institution has contributed to the dynamic progress and revolutionary character of the twentieth century.

"The great American business enterprise of today is as different from its nineteenth-century prototype as disciplined soldiers are differ-

ent from a neighborhood gang. The successors to the old robber barons have built organisms of men, materials, engineering and scientific research which approximate the automatic precision of a machine. Chance and accident have been almost entirely eliminated from industrial progress. Invention no longer requires a flash of genius. We are able to profit from the abilities of ordinary individuals, bound together by the new art of industrial management. We have learned that the psychology of advertising on a colossal scale can sweep aside the resistance of established custom, and change the habits and wants of an entire population. Science and industry create new products. Men and materials are coordinated to produce and distribute them. Psychology and publicity create a demand for them.

"This twentieth-century wonder, the big-business enterprise, is uniquely different from the nineteenth-century 'trusts'. Where many large businesses were formerly owned and controlled by a few men, the modern industrial giant, managed by professionals, is not owned in any real sense by anybody. Its stockholders are as diverse as the community itself. Housewives, universities, charitable foundations, small businessmen (in fact almost everybody) own these enterprises.

"Since the depression, American business management has been changing its pattern of behavior. Before that, the expansion of modern corporate enterprise had not been so much in the direction of building up independent markets for their goods. Markets were taken for granted. Great businesses used their power to acquire local businesses which processed or distributed their products. They created a system of absentee ownership of local enterprises which often drained capital away from outlying areas instead of creating new independent purchasing power there.

"It was a policy of selling much and buying little, like the eighteenth-century English business policy that contributed to the loss of the American colonies. Too many Eastern corporations regarded local business, which sold or processed their goods in the West and South, as a loss of opportunity for profits to which the home corporation was legitimately entitled. And abroad, American business joined international cartels rather than try to meet foreign competition by superior efficiency.

"But today most American businessmen realize that post-war productive capacity has exceeded the saturation point of pre-war markets. They realize that they must reverse the self-defeating tactics of depression times and export capital rather than drain it off. They know now that they cannot sell without buying. The adoption of the Marshall Plan with scarcely any dissent was a revolution in American business think-

ing. It recognized the need to bulwark foreign markets and to gear the economy of America with that of Western Europe.

"Big business must inevitably supplant the government in the export of American capital. We may look at just one great American enterprise as an illustration of this dynamic process at work.

"When, as head of the Antitrust Division, I tried to explain to businessmen the competitive economic ideal of the Sherman Antitrust Act, they challenged me to name one big American business that violated neither the letter nor the spirit of our antitrust laws. It was a fair question. I answered by describing The Coca-Cola Company. Since then, I have learned more about Coca-Cola because I have become one of the company's many lawyers, and I am convinced that this organization represents the emerging pattern of our future free-market economy.

"Coca-Cola is the most widely advertised and distributed single product that the world has ever known. When you don't see a Coca-Cola sign, you have passed the borders of civilization. It is in the best hotels as well as in the mines, in the factories, in every size and kind of community. It is constantly invading new markets, crossing international trade barriers. No Marshall Plan was necessary to get it to Europe. It creates simultaneously capital abroad and profits at home. It builds business ties, profitable commercial relationships and friendships for America all over the world. People will pay a nickel for a Coke long after they have stopped buying some necessities.

"After more than 50 years, you can still buy Coca-Cola at the greatest number of retail outlets for a nickel. The cost of all its ingredients—sugar, machinery, transportation, labor, advertising, selling—has doubled and trebled, but the price of the end product has somehow remained the same.

"Coca-Cola might increase its short-run profits by raising the price. But Coca-Cola realizes that it is operating a mature business and not a hit-and-run enterprise. It is not like an individual trying to make enough to retire. It is interested in the future of its great world-wide enterprise. The market which Coca-Cola created by lavishing money and energy for over half a century is its most valuable property. Therefore, though Coca-Cola does not fix prices (a first-class hotel can get 50 cents for a drink if its wants), it nevertheless keeps that market alive and expanding by seeing to it that the corner drugstore can make money selling it at a nickel.

"Coca-Cola builds up its own markets by leaving the profits of bottling and selling its product to local enterprise. This is a most important factor in the strength of Coca-Cola at home and abroad. For example, French wine merchants, afraid of Coca-Cola's competitive

power, and Communists, who feared its American free-enterprise propaganda value, united a few years ago to urge the National Assembly to ban its sale in France. Their success was brief. A bill giving the Minister of Health power to ban certain manufactured drinks was passed but the ban was never applied, chiefly because local French business made money out of Coca-Cola. It was not a case of absentee ownership. The local bottling and distributing businesses were owned and controlled by French concerns and abandonment would represent a loss to the French economy.

"Coca-Cola is creating prosperous local businesses abroad and in every state of the Union, and these businesses could not prosper without the markets which Coca-Cola has developed, and without its low-cost mass production of goods which supply those markets.

"Coca-Cola represents the twentieth-century way of exporting capital and spreading purchasing power at home and abroad. It is the largest user of sugar in the world. It owns neither refineries nor sugar plantations. It is the largest purchaser of bottles and vending machines in the world. It has no invested interest in either industry. Thus the vast markets Coca-Cola has developed become outlets for the people who do grow and refine sugar and make bottles and machinery. Thus Coca-Cola enriches every independent industry on which it depends for its materials.

"Though Coca-Cola sells more soft drinks than any other company in the world, it is also serving its competitors. They benefit from Coca-Cola advertising because that advertising creates a greater demand for all soft drinks. As Coca-Cola's sales increase, the sales of its competitors increase also.

"The Coca-Cola story gives a vivid preview of how we may expect the corporate growth of the twentieth century to export capital and develop the markets of the new frontier. The true capital of the twentieth century is its industrial potential constructively directed and dynamically inspired by private industry. This capital is the aggregate growth of the decades since Henry Ford's first assembly line, and it has organized and incorporated the know-how of the world into a human machine which is capable of producing faster than wars destroy.

"The old nineteenth-century trust was a kind of combination to control principally through stock manipulation, rather than through competitive expansion, vast areas of our economy.

"England, before World War II, through international cartel agreements, divided world markets, and her industry became soft and obsolete because it was protected against vigorous competition. It is easier to buy up your competitor's business than to beat him by making your

business more efficient. It is easier still to divide the market between yourself and your competitor and to use your combined power to keep others out. That is the way of stagnation. American industry has generally rejected that way."

The antitrust laws cannot operate in the abstract. Both the enforcing officers and those who study the laws with the idea of possible amendment must have some concrete pattern of industry in mind which they wish to achieve. I suggest that the organization of Coca-Cola is something of a model. And I suggest that enforcement policies must be geared to this model. The key to the problem of cyclical depressions and overproduction is the structure of industry. Where that structure is concentrated, where there is no room for the development of local ownership and where as a result the manufacturing corporations have such control over their prices that they can exact enormous profits, there is no urge to develop new markets. Then the economy runs the circle to the stagnation point again. The antitrust laws are our best device to insure that this does not happen, and the organization of Coca-Cola and other companies like it gives a far better understanding of the way they should be used than does any abstract set of formulas and rules.

THE CHARACTER OF A LAWYER IN THE COMMUNITY†

*Charles B. Taft**

A lawyer is historically a draftsman of technical language. His highest usefulness is not revelling in "gobbledegook," but careful and accurate interpretation of unspoken intent; exploration, excavation, perhaps, to bring out all the underlying views of both parties, all possible troubles that might develop in operations under the agreement. His true success lies in the establishment of peace and harmony and teamwork in one enterprise in place of disputes and hard feeling and lawsuit.

There is a real problem here. If any of you have examined important cases, or trust agreements, or mortgage indentures, you have surely been overwhelmed by verbiage. I recognize that most phrases or paragraphs are seeking to do what I have just been describing, anticipating disagreement and trouble. I know, too, that some of them are reflections of particular decisions of the courts, and that changes or condensations open up the possibility of more and unnecessary litigation.

But some of it is certainly "gobbledegook," the product of minds fascinated by their own verbosity. Can't the law schools tackle this, and roll back the flood? Sometimes the flood comes from the bench, and perhaps institutes for practicing lawyers where the judges are invited and honored may help even there. The restatement of the law by the American Law Institute was a step in the right direction. Perhaps it can go to work on your books, and even extend into the area of the Commissions on Uniform State Laws, to produce better legislative drafting.

A lawyer is also an advocate. It was the practical intent of the common law, not exactly that we should learn by experience, although that was part of it, but that the vigorous and effective presentation of opposing viewpoints about a dispute, should produce a fair balance of forces, particularly if guided by a fair and competent umpire. This is really the most enjoyable part of the lawyer's life, even if it is not the way to earn a living.

One of our difficulties in the application of the common law to the American scene is that we have so largely prevented the trial judge from insuring that the balance of the opposing forces is fair and just. After all this is not a game, nor a contest among lawyers for pre-eminence, but a search for justice in which we lawyers are officers of the court.

It is not a game, but sometimes it is essential to put on a show, and

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†An address delivered at the University of Mississippi, March 14, 1955.

*Attorney at Law, Cincinnati, Ohio; President of the National Council of Churches.

a good trial lawyer is to some degree an actor. A jury comes into the court room without much background in the law. Garfield used to say that he had to make a point in a political speech, where the crowd is the jury, three times before the people in the back rows really took it in. I tried first degree murder cases as a prosecuting attorney and it took "scenery" to produce an effect, which was actually a representation of the truth.

Yet this is or can be close to the line. The very power to move people tempts you to go beyond. Does Perry Mason break over? This is something worth exploring in law school, because integrity is the saving grace of the advocate.

An advocate may well be involved, as I am now, in the promotion, even nationally, of a general program and in connection with that, he may be a lobbyist talking to congressmen and senators about the bills that incorporate his program. Such a lobbyist can perform a very useful and necessary service. He can secure and furnish to the legislator detailed information about matters which are new and strange to the representative of the people. A senator may have concentrated on government expenditure, and then become chairman of the committee that handles that subject, but tariffs as well. Partial presentations by the other side have to be filled out. Nobody else in most government situations is in a position to render that service. Obviously it has to be honest and accurate. Obviously it does not include the traditional parties if they exist, given the solons which leave them exalted but voting the right way.

Our situation as advocates is made more difficult by that modern phenomenon, the pressure group, which in one way or another most of us lawyers represent. Mr. MacDonald of the Steel Workers and Mr. Stephens of U. S. Steel, Mr. Reuther and Mr. Bugas of Ford have to fight. It used to be Mr. MacDonald and Mr. Reuther competing for prestige with each other and with John L. Lewis. It seems changed now with Mr. MacDonald, Mr. Reuther and Mr. Meany all in the same camp, but Mr. Dave Beck has not signed the no-raiding agreement, and Mr. Lewis is still on the outside.

Mr. Reuther has had the left wingers in full cry after him within his own union, or at least the "rank and file" leaders. Mr. Stephens does not speak for the independent steel makers, Republic or Bethlehem or Inland, nor yet for the innumerable little fabricators; Mr. Bugas does not speak for Chrysler or General Motors when he begins to negotiate on the guaranteed annual wage, but each knows that others are around —my, yes!

So when lawyers who represent labor or management come to an

American or a State Bar Association meeting, they can't always have that old time camaraderie. They might be quoted. It's all off the record of course, and nobody is carrying tales, but this can't always be any longer that small community of friends at the bar, who compete with vigor, but with a spirit of sportsmanship. This is war.

So many of us now belong to large firms, which may represent in a large city, or even a small one, every conceivable kind of interest. If you express your opinions about community questions too strongly in public, you may find yourself stepping on the toes of a client, who is probably part of a pressure group, and a client, perhaps, you didn't even know the firm had. Yet the income you have achieved may cause you to be such that you can't (or think you can't) take a chance for your family in getting out into a smaller firm. Your independence is at least undermined. Can you even think about Edgar Ansel Mowrer's thesis in the *Saturday Review of Literature* a few weeks ago, that all our progress comes from non-conformity and self-direction?

Take another area: the Bill of Rights that we cherish. Have we allowed the Communists to take away from us a most essential part of it? The Fifth Amendment, against self incrimination, was put in the Bill of Rights because our forebears knew what governments could do to force confession. Torture is far from our experience—or is it? It goes on today, certainly in the form of brain washing and confession; you read a few days ago about the two American civilian prisoners released from China.

I don't doubt that the Fifth Amendment is claimed improperly. Some claimed it where I am sure of their own innocence and their objective was clearly to protect others; this was unwise. The Amendment is still as sound as it ever was, but the agitation against it, or at least to evade it, has reached a point when the Chief Justice of the United States is close to the truth in asking if the Bill of Rights would pass the legislature of thirty-six states today, in its present form. Would Congress today lead the fight for its ratification?

Gentlemen, if these various pictures of the effect of pressure groups on lawyers in our present society are true, then we will have destroyed two of our precious inheritances of the past: individual independence, with common community spirit. We will have yielded to the vicious ill-will of that nasty old man, Karl Marx. We will have conceded the class struggle, and thrown the brotherhood of man out the window.

If, on top of that, we let clients or anybody else make us into what could issue from the wedding of a conveyancer and an advocate, namely a cantankerous fly-specker, we are in a pretty bad way. We are today in serious danger of that particular foretaste of hellfire.

Fortunately lawyers do not readily harden into those exact patterns. We put on a rather imposing front of a little knowledge about nearly everything. This puts a rather steady pressure on us to become advisors on broad principles, with an opportunity, if we take it, to develop a few broad principles ourselves.

Many of us become general counsel of something, and many general counsel become top executives of the company. It is curious that it should be so, for the usual experience of a lawyer, or perhaps lack of experience, makes him utterly messy, and apparently not competent to administer anything complicated. But in spite of every habit derived from a lawyer's desk and office and library, some do have enough feeling for people and character and even orderliness in the presentation of ideas that they do well as the front man and even directing force of a company.

Lawyers do occupy such positions in business, and so they do in government. This is partly because legislation and criminal prosecution and legal advice in administrative law draws so many lawyers into politics and make politicians out of them because it is a natural way of advancement not unrelated to their profession. But in government there is no executive training; perhaps that is why lawyer politicians are not often very good administrators.

Both in business and in government, lawyer executives do have to adopt a broader view than that of the conveyancer or the advocate. They become responsible for policy, and share in the give and take of the group decision now characteristic of executive direction. Neither a conveyancer nor an advocate makes policy; he interprets it or fights for it as it is given to him. You are never quite as critical of policy after you have to make it once.

I venture to suggest that here and in a number of other fields lawyers lack some basic education that is not adequately supplied in our university system. Much of this is not strictly legal, though lawyers need it; it has value for all citizens.

Understanding of organization and of the democratic process within it is something needed by practically everybody. People are not a huge herd; they are little groups at work, in the neighborhood or lodge, and in the family. The biggest organization is just a collection of little groups. For an organization to succeed it must have purposes general enough to appeal to all or most of its members, and for each little group in it there needs to be a more personal share in some closer purpose. The leaders of the organization have to find ways to get from the little groups and members participation in the plans for action, by comments and reactions and recognition, at the same time that they have to let them fully

share in the understanding of the operation that is expected from the whole outfit and from their part of it. Communication has to be down and up.

At the same time all of us need to understand how a small group of articulate and intelligent people, discussing a plan or project, can arrive at a conclusion different and more effective than the idea with which any one started, or at least an agreement on most, and clear definition of any remaining disagreement. This is the miracle of the democratic process. The process is still democratic even if the disagreement is not resolved by a majority vote, but by the decision of the chosen executive head.

Negotiation is a second technique much more generally needed, but certainly important for lawyers. Twenty-odd years ago I suggested at Yale the necessity for a course in "dickering" at the Law School; for all the amusement then, they have a course in negotiation now. Surely there are principles involved, but most of us have had to learn them by ear.

There are many kinds of negotiation, but the essence of all of them is the firm knowledge of what priciples cannot be surrendered, and what concessions can be made that are not such a surrender. It is usually a matter of possible alternatives. In legislative or in labor matters or in foreign affairs or in mergers or in purchases and sales it takes a nice judgment. Many lawyers are successful at it and all lawyers are called upon for it on occasion. One may have been trained in legislative negotiation, like James F. Byrnes, and found as Secretary of State how different it was to negotiate with the Russians on Germany, or the French on tariffs and quotas and exchange restrictions.

A third area not adequately covered as a rule for the ordinary law student and prospective political or community leader is constitution and charter making. We have an American tradition finer than any, from Madison and Hamilton to John Foster Dulles and Arthur Vandenberg to the rather anonymous drafters of first-class municipal home rule city charters. But not much of the spirit of broad jurisprudence combined with technical drafting competence gets into our curricula. Only too often the role of a lawyer in dealing with a proposed charter for a city, a county, or an international organization in the meticulous examination of every possible interpretation and every conceivable eventuality as if it really could be strained to that meaning, or as if that particular pink elephant really existed.

Education to a sense of humor cannot be accomplished by any curriculum, but it is surely one protection against that horrid state of mind toward change per se. The strong conviction of the wider community interest is even more important. It has never been as essential as

in these days of pressures and explosive forces that could break us and tear us apart that the lawyer should insist upon being the conscience of his client and stand for a broad and practical approach to our problems.

Nothing is more dangerous today than the philosophy of Marx which sees progress in bitter strife and insists that there shall be no fair compromise out of honest humility. For the Communist there is no humility and no democratic process; there is only the absolutism of the party line of the moment. Their objectives mean the utter destruction of the integrity of any bar and of the independence of any judiciary.

We have a totally contrary tradition, a tradition of hostility to tyranny and a successful determination to destroy the absolute state. In the accomplishment of that aim in the western world in the last 400 years, in England and in the United States at least, lawyers have been far more than mere conveyancers or advocates. They have laid the very foundations of their nation upon principles of justice and mercy and I would add godliness. They are often obscured by clouds, and though our profession has to do its daily tasks with its higher objectives somewhat obscured, yet we can complete even those tasks in the conviction that the mountain tops of our ideals are truly there, reaching to the sky.

FEDERAL CROP INSURANCE: ANOTHER CUP OF HEMLOCK?

*Herman B. DeCell**

I. Introduction

The expansion of federal governmental activities is a controversial subject that has received much attention in legal literature in recent years. However, entry of the federal government into the crop insurance business is one phase of that expansion which has received only brief treatment in the legal periodicals despite the fact that there has been a substantial volume of litigation involving the crop insurance program.

The purpose of this article, therefore, is to consider briefly the general nature of that program and some of the legal problems presented in its administration. A reading of the various reported decisions suggests that the insured farmer has fared rather badly in litigation under the program, and some of the decisions are harsh pronouncements against claims for indemnity. Hence, the question is presented, whether from the farmer's point of view the program is a blessing or a curse. It is possible that the program may be just another example of creeping socialism, that, as one judge said, the farmer's premium may become an "investment in disappointment."[1] Or, on the other hand, it may be that the program is a beneficient governmental adjunct to aid private enterprise in the absence of comparable coverage offered by private companies.[2]

The frustrated claimants in the leading case in the field, *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 92 L.Ed. 10 (1947), no doubt concluded that federal crop insurance is a bitter cup to swallow. There the claimants had made a wheat crop under the assurance of the corporation's employees that the crop was insured. After sustaining a severe loss, giving timely notice, and duly filing a claim, they were told that the regulations prescribed coverage sought and that they were really never insured! The U. S. Supreme Court eventually upheld the denial of liability.

Whether viewing federal crop insurance with favor or otherwise, the Mississippi lawyer must accept the program as one of the facts of rural life. He is likely to encounter such legal problems as questions of coverage, inception and termination of the contract, giving of required notice, etc. For example, cotton crop insurance is being offered in nine-

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[1]Jackson, J., dissenting in Federal Crop Ins. Corp. v. Merrill, 332 U. S. 380, 388, 92 L. Ed. 10, 17 (1947).

[2]See Merrill case, *supra,* 330 U. S. at 383 n. 1, 92 L. Ed. at 14 n. 1.

teen Mississippi Counties[3] during the crop year 1955, and under existing legislation the crop insurance program may be expanded each year to extend coverage to as many as one hundred additional counties throughout the nation.[4]

It is hoped that this article will be of interest and benefit to the Mississippi Bar and may serve as a starting point for further research on more detailed questions.

II. Statutory and Administrative Structure

The crop insurance program was established by the Federal Crop Insurance Act of 1938.[5] Coverage was first offered in 1939, but despite continuous experience thereafter there remain many unsolved problems and unanswered questions. There have been both expansion and retrenchment in types of coverage offered as well as geographical areas covered, and government officials frankly admit that the program is still in the development stage.[6] Although administrative costs have been borne primarily through governmental appropriation, as late as 1953, virtually no reserves against future losses had been accumulated by the agency, and the loss ratio (indemnities/premiums) for the five year period 1948-52 was .97.[7] Experience during the crop year 1954 resulted in an estimated $5.5 to $6 million excess of indemnities paid over premium income, according to agency officials.[8] It may be anticipated that this substantial operating deficit will materially affect premiums and indemnities as well as administrative policies toward both, during current and future crop years.

The F.C.I. Act created the government owned Federal Crop Insurance Corporation, as an agency within the Department of Agriculture and with the responsibility of administering the act and insurance program.[9] Management of the corporation is vested in a five-man Board of Directors, consisting of the corporation manager, two Department of Agriculture employees, and two persons with insurance experience but not otherwise employed by the government. Appointments to the board are made by the Secretary of Agriculture.[10]

The Act sets up a general outline for crop insurance coverage but

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[3]Alcorn, Bolivar, Coahoma, DeSoto, Holmes, Humphreys, Jefferson Davis, Lee, Leflore, Madison, Marion, Monroe, Quitman, Sharkey, Tallahatchie, Washington, and Yazoo. (From letter to the writer from J. S. Smith, Mississippi State Director, Federal Crop Ins. Corp., Jackson, Miss. Jan. 5, 1955.)

[4]7 U.S.C.A. Sec. 1508; Report of Manager of Federal Crop Ins. Corp. 1953 (Government Printing Office, 1954.)

[5]7 U.S.C.A. Secs. 1501, et seq.

[6]Report of Manager of Federal Crop Ins. Corp., 1953. (Government Printing Office, 1954.)

[7]*Ibid.*

[8]*The New York Times,* Dec. 15, 1954, p. 49, Col. 1.

[9]7 U.S.C.A., Sec. 1503.

[10]*Id.,* Sec. 1505 (a).

provides that the Secretary of Agriculture and the corporation may promulgate such regulations as may be necessary to implement the law.[11] When duly adopted and published in the Federal Register these regulations have the full force and effect of law.[12]

The administrative structure also includes a state office headed by a state director and county offices for each county where coverage is offered. These county offices were formerly maintained as part of the local Production and Marketing Administration offices but are currently operated independently. These county offices are of vital importance for, as will be pointed out later, some of the features of the program are extremely complex, and the average farmer requires much assistance from the county employees in applying for and determining coverage, reporting acreage, giving notices of loss, filing claims, etc. Sound administration requires that there be competent, adequately trained employees to provide these services. Unfortunately much controversy and litigation has arisen directly as a result of erroneous information or improper assistance furnished by employees inadequately trained or otherwise ill-equipped for these tasks.[13]

In view of the fact that the program has been established by federal law and is administered by a federal agency, apparently the controlling and only applicable law in the field is the F.C.I. Act and regulations. Hence, even though the insurance consists of a contract made and wholly performed within one state, state law has no effect on the rights and obligations of the parties.[14]

III. Crop Coverage

Coverage is currently being offered in accordance with Section 1508, F.C.I. Act, and includes the following crops: wheat, cotton, flax, tobacco, corn, beans, multiple crop, and citrus.[15] Coverage is not confined to a single hazard or to a limited number of hazards as in the case of private crop insurance coverage but is "all-risk" coverage. Thus, there is insurance against loss "due to unavoidable causes, including drought, flood, hail, wind, frost, winterkill, lightning, fire, excessive rain, snow, wildlife, hurricane, tornado, insect infestation, plant disease, and such other

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[11] *Id.*, Sec. 1516 (b).

[12] Federal Crop Ins. Corp. v. Merrill, 332 U. S. 380; 92 L. Ed. 10 (1947); Felder v. Federal Crop Ins. Corp., 146 F. 2d 638 (4th Cir., 1944); Smith v. Federal Crop Ins. Corp., 214 Miss. 55, 58 So. 2d 95 (1952).

[13] See, for example, Merrill and Smith cases, *supra*, note 12; Frier v. Federal Crop Ins. Corp., 152 F. 2d 149 (5th Cir., 1945); Mock v. U. S., 183 F. 2d 174 (CA 10 1950); U. S. v. Blackburn, 109 F. Supp. 319 (E. D. Mo. 1952); Smith v. Federal Crop Ins. Corp. 214 Miss. 55, 58 So. 2d 95 (1952); and U. S. v. Cain, 112 F. Supp. 617 (W. D. Okla. 1953). In each of these cases there was misrepresentation or improper conduct by the corporation's employees with resulting hardship on the insured. Yet there could be no estoppel or waiver as a result of conduct of the governmental employees and in each case the insured was denied the relief sought.

[14] Federal Crop Ins. Corp v. Merrill, *supra*, note 12.

[15] Manager's Report, *supra*, note 6.

unavoidable causes as may be determined by the Board [of Directors]."[16] Hazards not insured against relate primarily to factors generally within the insured's control, e. g. failure to use good farming practices, machinery breakdowns, crop theft, etc.[17]

The general purpose of the act is to provide only partial insurance and to require the farmer to be a co-insuror. Thus, coverage is fixed at not exceeding 75% of the average yield for each insurance unit. In its advertising and soliciting the corporation maintains that it endeavors to insure only the farmer's out-of-pocket investment, that the purpose is to keep premiums low by not anticipating profit in the crop.

The exact amount of coverage also depends on the time when loss occurs as well as the location of the particular farm unit. Thus for cotton four stages of production are established:

"First stage. After it is too late to plant cotton but before the first cultivation;

Second stage. After the first cultivation but before laying by;

Third stage. After laying by but before harvest; and

Fourth stage After harvest and to the end of the insurance period." These stages are established to limit indemnity to a smaller figure in the earlier stages on the theory that the insured has less out-of-pocket expenses during the earlier stages. In other words, if the crop is totally or substantially destroyed during an earlier stage, theoretically no further out-of-pocket expenditures would be incurred. Consequently, it is assumed lower coverage would be sufficient protection. Where there has been total or substantial destruction prior to completion of the crop, the acreage so damaged may be released by the corporation and the loss determined as of that time.

In addition, coverages are fixed by areas within each county under a

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[16] 7 U. S. C. A., Sec. 1508 (a).

[17] The currently used form of policy covering cotton crops expressly excludes coverage for loss caused by: "(a) Failure to follow recognized good farming practices; (b) poor farming practices, including but not limited to the use of defective or unadapted seed, failure to plant a sufficient quantity of seed, failure properly to prepare the land for planting, or properly to plant, fertilize, care for or harvest (including unreasonable delay thereof) the insured crop; (c) failure properly to apply measures recommended by the State agricultural college for the control of insects and plant diseases; (d) planting cotton on land which is generally considered incapable of producing a cotton crop comparable to the average crop produced in the coverage and premium rate area in which the land is located; (e) planting cotton on land following peanuts harvested for nuts; (f) planting excessive acreage under abnormal conditions; (g) planting another crop (except winter legumes) in the growing cotton crop; (h) planting cotton under conditions of immediate hazard; (i) inability to obtain labor, seed, fertilizer, machinery, repairs or insect poison; (j) breakdown of machinery or failure of equipment due to mechanical defects; (k) neglect or malfeasance of the insured or of any person in his household or employment or connected with the farm as tenant, sharecropper, or wage hand; (l) domestic animals; (m) action of any person in the use of chemicals for the control of noxious weeds; or (n) theft."

county actuarial table. The coverage and premium for a particular unit are based on prior experience and may vary from year to year. For example, the 1955 County Actuarial Table for Yazoo County for cotton crop insurance coverage per acre in lint cotton is as follows (fixed price —31c per pound):

AREA	FIRST STAGE	SECOND STAGE	THIRD STAGE	FOURTH STAGE	PREMIUM PER ACRE
1	----------NON-INSURABLE----------				
2	----------NON-INSURABLE----------				
3	61 lbs. or $18.81	97 lbs. or $56.42	182 lbs. or $56.42	242 lbs. or $75.02	10 lbs. or $3.10
4	70 lbs. or $21.70	112 lbs. or $34.72	210 lbs. or $86.80	250 lbs. or $65.10	10 lbs. or $3.10

Regardless of when the loss occurs the premium remains the same for each particular area, but extent of coverage varies depending upon when the loss occurs, that is, within which stage of production, as described above.

Extent of coverage also depends upon the insured's interest in the crop—whether 100%, 50%, 25% or otherwise. It is possible, therefore, for more than one policy to be issued on a particular insured unit, each policy insuring the undivided interest owned by the insured. Also, a farmer applicant may obtain coverage on share-tenant or sharecropper interest in acreage in which the applicant has an interest as owner or tenant operator. Under such coverage the applicant is deemed to be the insured as to such share interests in addition to his own interest. It can be seen that such additional coverage is desirable to protect an insured operator who might otherwise not have sufficient legal title in the share interests to constitute an insurable interest. Such coverage would be particularly advantageous under current farming practices where the owners or operator furnishes the owners of the share interests and thereby acquires a definite economic interest in the outcome of the share interests in the crop.

IV. Crop Insurance Contract

The form of crop insurance contract currently used by the corporation resembles generally the standard indemnity policies written by private casualty companies. The form contains a general insuring agreement followed by terms and conditions fixing the rights and obligations of the parties. The insured is obligated to use good farming practices, report acreage planted, report losses promptly, file proof of loss for claims, pay premiums when due, keep production from different insurance units

separate, etc. The extent of coverage and obligation of the corporation to pay indemnity are spelled out in considerable detail. Because of peculiarities in crop insurance, such as determination of extent of coverage, the current contract is longer and more complex than the usual private indemnity politices, e. g., the New York standard form automobile liability policy.

The crop insurance contract consists of a (1) short application form which includes a premium promissory note and a space for acceptance by the corporation and (2) the policy form. Formerly, the contracts consisted merely of (1) insured's application, (2) corporation's acceptance, and (3) applicable crop insurance regulations incorporated by reference. From time to time the insured might or might not have access to those regulations, and they were of course subject to frequent amendment just as other administrative regulations might be changed. Thus, in *Federal Crop Insurance Corp. v. Merrill*[18] the insured claimants had been advised by the corporation's local agents that the crop in question was insurable, and the application for insurance was duly accepted by the corporation's branch office. However, the applicable crop insurance regulations, of which the applicants had no actual knowledge, precluded coverage for the particular crop involved. The Supreme Court majority accordingly reversed an indemnity award for the applicants and denied any recovery. The Court recognized the harshness of the decision but held (5-4) that the regulations had the effect of law and that there could be no estoppel or waiver against the government corporation as a result of the conduct of its employees.

The corporation has fortunately changed its procedure, and the regulations are now printed in the policy form as an integral part of the insurance contract. The policy form still requires careful and thorough reading for an understanding of its provisions, but at least the insured now has the entire contract readily accessible.

In another important respect the crop insurance contract is substantially different from the usual casualty policies. When the application for crop insurance is accepted by the corporation, the contract continues in force automatically from year to year. One of the parties must take affirmative action to terminate the agreement by giving written notice in the manner and within the time specified in the contract.[19]

V. Some Other Legal Problems Presented

The most significant legal aspect of the crop insurance coverage is that the insurer is the government, and consequently various sovereign immunities are applicable. Dealing with the government involves cer-

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[18]332 U. S. 380, 92 L. Ed. 10 (1947).
[19]See U. S. v. Cain, 112 F. Supp. 617 (W. D. Okla. 1953).

tain obvious disadvantages and places additional burdens on the insured. In the *Merrill* case the majority opinion pointed out, "The oft-quoted observation in Rock Island, A. & L. R. Co. v. United States, 254 U. S. 141, 143, 65 L. Ed. 188, 189, 41 S. Ct. 55, that 'Men must turn square corners when they deal with the Government,' does not reflect a calloused outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury."[20] Sometimes it seems that the combination of those "conditions defined" and bureaucratic red-tape is too formidable an obstacle to the prospective claimant.

Fortunately, the doctrine of sovereign immunity is no longer favored by the courts or legislative bodies, and the government corporation is now more frequently held to some of the standards and obligations of a private corporation while the United States itself would still be wholly immune.[21]

Various questions of sufficiency of notice required under crop insurance contracts have been raised in several reported decisions. Most of the issues have been resolved adversely to the insured claimant on the ground that the applicable regulations have the effect of law and must be strictly complied with.[22] On the other hand, the courts have recognized that in the absence of prejudice to the corporation substantial compliance may be sufficient.[23]

Apparently because of the novel and complex procedure for procuring coverage under the program there have been an unfortunately large number of litigated controversies in which incorrect statements or misrepresentations as to coverage have been made by corporate employees to crop insurance applicants.[24] In these cases there was detrimental reliance by the claimants, and despite the resulting hardship the courts have consistently held that there can be no waiver or estoppel against the corporation on the basis of the employees' conduct. This judicial attitude overlooks to some extent the realities present in the program. Under a program of this complexity the average farmer must have as-

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[20]332 U. S. 380, 385, 92 L. Ed. 10, 15.

[21]See National Home for D. V. S. v. Parrish, 229 U. S. 494, 57 L. Ed. 1296 (1913)—government corporation held liable for interest on contractual obligation; Keifer & Keifer v. R. F. C., 306 U. S. 381, 83 L. Ed. 784 (1939)—federally owned regional agricultural credit corporation held not immune from suit; FHA v. Burr, 309 U. S. 242, 84 L. Ed. 724 (1940)—Federal Housing Administration held subject to garnishment; RFC v. Menihan Corp., 312 U. S. 81, 85 L. Ed. 595 (1941)—Reconstruction Finance Corporation held liable for court costs and attorneys fees; Ferguson v. Union National Bank, 126 F. 2d. 753 (4th Cir. 1942)— FHA held liable for interest on indemnity; and Federal Crop Ins. Corp. v. DeCell, —— Miss ——, 76 So. 2d 826 (1955)—crop insurance corporation held liable for interest, court costs and statutory appeal damages.

[22]See, for example, Felder v. Federal Crop Ins. Corp., 146 F. 2d. 638 (4th Cir. 1944) and U. S. v. Blackburn, 109 F. Supp. 319 (E. D. Mo. 1952).

[23]Sanborn v. Federal Crop Ins. Corp., 93 Cal. App. 2d. 59, 208 P. 2d. 728 (1949); Federal Crop Ins. Corp v. DeCell, —— Miss. —— 76 So. 2d. 826 (1955).

[24]See cases cited in note 13, *supra*.

sistance and must be furnished information from the corporation's employees. That assistance and information will be useless to him if he cannot place some reasonable degree of reliance on them. There are, of course, cogent reasons for precluding governmental waiver and estoppel, but as was forcefully urged in the dissenting opinion in the *Merrill* case[25] when the government enters into private insurance business, the same fundamental principles of fair dealing applicable to private carriers should be observed.

VI. Conclusions

The familiar hazards to which farming is subject and the precarious position of the farmer's crop investment suggests that some form of insurance coverage is desirable for every farm operation not of sufficient scope to justify self-insurance. Until such time as all-risk private coverage is available, every farmer should give serious consideration to procurement of federal coverage where available. The lawyer with farm clients can perform a real service in at least advising those clients of the availability and general scope of federal coverage.

Federal coverage requires more careful study, and the insured farmer must be advised to "turn square corners." The farmer incurs greater obligations under the federal crop insurance contract than he does under the average casualty policy. In addition to payment of a substantial premium, there are continuing obligations—making an acreage report, following recognized farming practices, giving prompt notices of crop damage, etc. In other words, it is not possible to forget about the policy until a claim must be made. To obtain the benefits of crop insurance the farmer must know and understand the coverage and be especially cautious in fulfilling his duties under the contract.

At the same time successful administration of the program requires that corporation personnel be adequately trained and thoroughly familiar with every phase of crop insurance. It is particularly important that while the program remains on an experimental basis changes in regulations and procedure be widely publicized. At the same time every effort should be made to simplify the procedure and coverage to the end that the average insured farmer can readily comprehend what he has and what he does not have in federal crop insurance coverage.

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[25]332 U. S. at 386, 92 L. Ed. at 16.

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Student Comments

MISSISSIPPI GAME AND FISH REGULATIONS*

This article provides a current analysis of some of the fish and game laws of the state of Mississippi for the practicing attorney; it encompasses pertinent provisions of the Mississippi Game and Fish Laws, as well as decisions of the Mississippi Supreme Court and Opinions of the Attorney General, relative to the subject.[1]

Game and Fish Commission

The game and fish laws of the State of Mississippi are administered wholly under the auspices of the Mississippi Game and Fish Commission, which was created in 1932.[2] Under the present code, the Commission is authorized to make any rules or regulations necessary to carry out the provisions and purposes of the game and fish laws. The Mississippi Code specifically states that any violation of such rules and regulations constitutes a misdemeanor.[3] The Commission has jurisdiction over "the entire state, and to the thread of the stream or the middle of the Mississippi," and further has concurrent jurisdiction with the State of Arkansas to the Arkansas side of the Mississippi River.[5]

Some of the more important functions of the Game and Fish Commission, as interpreted by the Attorney General, are the following:

(1) The Commission has the right during an emergency to close or shorten the open season on any species of game animal or fish;[6] however, because there is no closed season on fishing in Mississippi, the Commission may not order a closed season for any reason on fishing. The authority for ordering a closed season extends only to those cases where there is a closed season provided for in the statute.[7] The Commission may *shorten,* but not *enlarge,* any season on game or fish,[8] and it may *lower* but not *increase* the bag limit on game or fish.[9] (Italics ours).

(2) The Commission has the power to expend money from its fund (said fund being derived from the sale of licenses, gifts, or otherwise) for protection, preservation, or conservation of game, game-birds, or fish.[10] This authority of the Commission extends outside the State of Mississippi, even when the work is to be performed entirely in another state. The Commission must first have the permission of the owners of the

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*The writer is deeply grateful to the staff of the Mississippi Game and Fish Commission, and to Mr. Rex McRaney in particular, whose efforts and research in materials not available to the writer made this Comment possible.

1A copy of each letter or opinion referred to in this article is on file with the Mississippi Game and Fish Commission and the Mississippi Law Journal. The original carbon of each is on file in the office of the Attorney General of the State of Mississippi. This information is available upon request.

2Miss. Laws 1943, c. 123; Miss. Code Ann. (1942) § 5841.

3Miss. Code Ann. (1942) § 5844.

4Mem. Op. Atty. Gen. (Letter Aug. 17, 1936).

5Miss. Code Ann. (1942) § 2420; 2421.

6Miss. Code Ann. (1942) § 5844 (a).

7Mem. Op. Atty. Gen. (Letter Mar. 28, 1936).

8Mem. Op. Atty. Gen. (Letter Jan. 11, 1941).

9Mem. Op Atty. Gen. (Letter Nov. 19, 1948).

10Miss. Code Ann. (1942) § 5844 (i).

property to be used in any project, and all of the owners of such property should release the Commission from liability for any damage.[11]

(3) The Commission may regulate the taking of non-game gross fish,[12] but strangely enough, this has been construed by the Attorney General to mean that the Commission does not have authority to contract with any individual, corporation, or association to take non-game fish from the lakes and other waters of the state. Such contract would be a special privilege and cannot be a regulation in any sense of the term.[13]

(4) The Commission may employ counsel to defend any action brought against it or any of its employees.[14]

(5) The Commission may not at any time nor under any circumstances grant fellowships.[15]

(6) The Commission may issue permits to any person authorizing him to collect and possess wild game or birds for scientific purposes;[16] but this cannot be construed to mean domestic consumption,[17] and in view of the statutes which prohibit trapping of game birds, taking of eggs, buying and selling or the transportation thereof,[18] it is difficult to see how an individual could legitimately acquire birds to be used for propagation.

The members of the Game and Fish Commission have no authority to arrest any person for violation of the game and fish laws, but the Director of Conservation may do so, as well as any warden or peace officer.[19]

Duties and Powers of Wardens

Wardens may arrest a person for hunting out of season if such person has in his possession a gun, hunting bag, or bird dog. Such possession is prima facie evidence that one is hunting;[20] however, since this is a rule of evidence, the presumption may be rebutted. For instance, if a person is using a bird dog during dove season, when quail season is closed, whether or not he is violating the law is an issue of fact. If he is in fact hunting doves he is not violating the law, even though the bird dog is normally used for hunting quail.[21] Violators must be tried in the county in which they are arrested, and may not be taken into another county.[22]

A warden is authorized to make searches where he has cause to believe, and does believe, that animals, birds, or fish are possessed in violation of the law, and such warden may make the search without a war-

[11]Mem. Op. Atty. Gen. (Letter Feb. 10, 1942).
[12]Miss. Code Ann. (1942) § 5844 (k).
[13]Mem. Op. Atty. Gen. (Letter Aug. 24, 1932).
[14]Mem. Op. Atty. Gen. (Letter Feb. 25, 1943).
[15]Mem. Op. Atty. Gen. (Letter Sept. 14, 1938).
[16]Miss. Code Ann. (1942) § 5850.
[17]Mem. Op. Atty. Gen. (Letter Nov. 19, 1953).
[18]Miss. Code Ann. (1942) § 5850; 5885; 5886.
[19]Miss. Code Ann. (1942) § 5856; Mem. Op. Atty. Gen. (Letter May 21, 1936).
[20]Miss. Code Ann. (1942) § 5884; Mem. Op. Atty. Gen. (Letter Oct. 17, 1938).
[21]Mem. Op. Atty. Gen. (Letter Oct. 2, 1937).
[22]Miss. Const. Art. III, § 26; Miss. Code Ann. (1942) § 1831; 2419; Mem. Op. Atty. Gen. (Letter Dec. 18, 1950).

rant.[23] A search warrant is required in some instances, as in the search of a home or residence. A warrant to search frozen food lockers to determine if any of the game and fish laws are being violated is improper under the Constitution of Mississippi,[24] unless there is a separate warrant for each locker.[25] Game and fish taken within the State of Mississippi may be stored in public frozen food lockers.[26] After the storing of game or fish, a warden or other official may not obtain a warrant to search lockers unless said warrant specifies the thing to be searched, and the thing to be searched for and seized.

License Requirements

All game and fish licenses must be issued by a sheriff, warden, or bonded agent. The bonded agent is a person selected by the Game and Fish Commission and bonded as such.[27] No one except a duly appointed deputy sheriff can act for the sheriff in selling hunting licenses, and the sheriff is without authority to appoint any other person. The appointment of the deputy must be in writing and the appointee must take the oath of office. Both the order of appointment and the oath must be filed in the office of the Chancery Clerk of the county.[28]

A fishing license in the possession of every *person* fourteen to sixty-five years of age is required if such person is using *artificial bait.*[29] All *males,* ages sixteen to sixty-five must have hunting licenses in their possession to hunt game and game birds.[30] Any resident of the State of Mississippi over sixty-five years of age may hunt or fish without a license, but such person must have in his possession a certificate. This certificate, from the sheriff or circuit clerk, must show the person to be a resident citizen of the county and over the age of sixty-five years.[31] The above license requirements are fully applicable to Indians within the state, because they are citizens of the State of Mississippi and are not exempt by virtue of any treaty.[32]

A person is not required to have a license to hunt, fish, or trap if the title to the land is vested in such person, even though he is a non-resident.[33] This does not include a sharecropper, tenant on the halves, or any other rental arrangement since the "record title" to the property is not vested in such person.[34] If the title to land is vested jointly in man and wife, then neither is required to have a resident hunting and fishing license.[35]

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[23]Miss. Code Ann. (1942) § 5856; Mem. Op. Atty. Gen. (Letter Oct. 17, 1938).
[24]Miss. Const. Art. III, § 23.
[25]Mem. Op. Atty. Gen. (Letter Feb. 3, 1941).
[26]Miss. Code Ann. (1942) § 5892.
[27]Miss. Code Ann. (1942) § 5877. This statute requires that the application for the hunting and fishing license ". . . *shall* be subscribed and sworn to by the applicant before an officer authorized to administer oaths in the state. . . ." This is not enforced in any part of the state to the writer's knowledge. Such lack of enforcement makes it comparatively easy for non-residents to obtain a resident license. It is suggested this statutory requirement should be rigidly enforced.
[28]Mem. Op. Atty. Gen. (Letter Oct. 1, 1937).
[29]Miss. Code Ann. (1942) § 5906.
[30]Miss. Code Ann. (1942) § 5876.
[31]Miss. Code Ann. (1942) § 5883.
[32]Mem. Op. Atty. Gen. (Letter Nov. 3, 1941).
[33]Mem. Op. Atty. Gen. (Letter Feb. 5, 1954).
[34]Mem. Op. Atty Gen. (Letter Dec. 18, 1950).
[35]Mem. Op. Atty. Gen. (Letter Oct. 30, 1939).

The right to fish in a private pond has been construed to be the exclusive right of the owner thereof, and neither he nor the members of his family must have a license. Other persons fishing therein, with artificial lure, and within the age requirements, are subject to the payment of a fishing license the same as if fishing in public waters.[36]

A non-resident, to obtain a resident fishing license, must own property, "on any well-known lake, river, or gulf resort. . . ."[37] This statute gives the same license privilege to some non-residents that residents have and for that reason is strictly construed. A non-resident owning farming interests valued at fifteen thousand dollars and located six miles from Moon Lake was held without the purview of the statute.[38]

No license is required of residents or non-residents to fish in the coastal waters of Mississippi, as the Game and Fish Laws apparently refer only to fresh water varieties of fish.[39]

Taking of Game Animals and Fish

The statute in Mississippi limiting the number of fish that may be caught[40] has been held applicable to private lakes with outlets into other waters.[41] The Mississippi Supreme Court in *Ex Parte Louis Fritz*,[42] said in part:

> "In all running streams, large lakes, small lakes with outlets into other waters, the right of the state to regulate the time, the manner, and extent of the taking of fish is unquestioned. It is part of the police power of the state, which has never been parted with and cannot be surrendered. . . . Fish are *ferae naturae*. They are incapable until actually taken of absolute ownership except in artificial lakes or in small ponds that are entirely land-locked. . . . Petitioner does not own the fish in Horn Lake, and this would be true even if he owned the bed of the entire lake and all its waters. . . ."

The above does not apply to a lake or pond which is wholly situated on the property of an individual, or club, and where such lake or pond is land-bound, and where fish cannot get into or out of such lake or pond through other waters.[43] The legislature cannot interfere with the fishing privileges of the owners of private ponds having no outlets through which fish are accustomed to pass into other waters.[44]

The State Director of Conservation and the wardens have authority to seize and confiscate all devices illegally used in taking animals, birds, or fish, and to hold the same "subject to the order of the commission."[45] The clause quoted has been sharply limited by the Attorney General to mean that the Commission may not *permanently* confiscate illegally used

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36Mem. Op. Atty. Gen. (Letter Aug. 21, 1946).
37Miss. Code Ann. (1942) § 5870.
38Mem. Op. Atty. Gen. (Letter Jan. 23, 1951).
39Miss. Code Ann. (1942) § 5907; Mem. Op. Atty. Gen. (Letter July 18, 1941).
40Miss. Code Ann (1942) § 5908.
41Mem. Op. Atty. Gen. (Letter Sept. 22, 1953).
42186 Miss. 210, 38 So. 722 (1905).
43Mem. Op. Atty. Gen. (Letter Feb. 28, 1939).
44 26 C. J. 623, § 42. See also People v. Conrad, 125 Mich. 1, 83 N.W. 1012 (1900); State v. Roberts, 47 Am. Rep 199 (S.C. of N. H.).
45Miss. Code Ann. (1942) § 5886.

equipment until this statute has been clarified by the legislature. Further, there is some question as to whether or not the illegal devices may be confiscated if there are in fact no fish caught or no game killed, even though the person is violating the law. The problem arises due to the use of the words "in taking" in the statute in regard to the illegal devices. Should this be interpreted to mean devices *actually used* in taking of game, or devices *intended to be used* and *whose purpose is* the taking of game? Being a penal statute, this clause is to be strictly construed. It has been determined to be inapplicable to a motor vehicle as it was not actually and directly used "in taking" of game or fish.[46] Guns and fishing equipment are "devices" in the meaning of this statute; therefore, a warden may confiscate such equipment and hold the same until the offender pays his fine.[47] Pelts may also be taken, and if the violater is convicted, they may be kept for disposal by the Game and Fish Commission.[48]

In the taking of game animals and birds, one may use a gun no larger than 10 gauge, fired from the shoulder. Any gun used may contain a maximum of three shells; however, if the gun is capable of holding more than three shells, it must be plugged to comply with the statutory limitation.[49] This statute has been construed inapplicable to a .22 rifle having unlimited magazine capacity.[50] A bow and arrow or crossbow may be used in Mississippi for the taking of rabbits, opossums, racoons and deer only. No game fish or birds may be taken in this manner.[51]

The game and fish laws provide that it is unlawful to use dynamite or any other explosives for the taking of fish;[52] there is also a criminal statute to this effect.[53] This does not apply to a person using dynamite or other explosives for the taking of gravel from the bed of a lake or river, or for similar lawful practices, even though as an incident thereto some fish may be killed.[54] It is desirable that a representative of the Game and Fish Commission be present when such work is to be done.

Another unlawful manner of taking fish is the use of harpoons fired from a shotgun.[55] This matter was not clarified by the Attorney General, but from a careful reading of the statute, the use of harpoons fired from a shotgun *is* permitted for the taking of gar and buffalo.[56] It is submitted that this interpretation of the statute should apply only to fish other than those listed above, and should not be entirely exclusive.

Commercial Fishing

The Game and Fish Commission is given the power to fix the mini-

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[46]Mem. Op. Atty. Gen. (Letter Sept. 8, 1950). See also Santos v. Dondero, 11 Cal. App. 2d 720, 54 P. 2d 764 (1936).

[47]Miss. Code Ann. (1942) § 5856.

[48]Mem. Op. Atty. Gen. (Letters Nov. 19, 1932; Jan. 20, 1940; Dec. 18, 1950; Sept. 26, 1952).

[49]Miss. Code Ann. (1942) § 5853.

[50]Mem. Op. Atty. Gen. (Letter Oct. 7, 1953).

[51]Miss. Code Ann. (1942) § 5883; 5867; 5900; Mem. Op. Atty. Gen. (Letter Oct. 30, 1953).

[52]Miss. Code Ann. (1942) § 5890.

[53]Miss. Code Ann. (1942) § 2158.

[54]Mem. Op. Atty. Gen. (Letter Sept. 15, 1938).

[55]Mem. Op. Atty. Gen. (Letter May 12, 1939).

[56]Miss. Code Ann. (1942) § 5900.

mum size of mesh for use in barrel nets, hoop nets, and seins. This provision of the code provides:

> ". . . Provided further, that the Game and Fish Commission shall not have authority to fix a minimum size mesh of more than three inches for use in barrel nets, hoop nets, and seins."[57]

This has been construed to provide that no mesh in those nets mentioned is legal if *over* three inches in size.[58] This matter is of major concern to commercial fishermen in many parts of the state who desire the size limit raised to four inches. This does not apply to a person taking fish from his own private lake, provided the lake is land-locked and is wholly owned by him.[59]

There have been instances where fish dealers throughout the state were reported to be selling commercial fish to markets and restaurants on a retail fish dealer's license. The Attorney General was requested to make an interpetation of Chapter 250, Laws of 1942, and Section 5906, Mississippi Code Annotated, 1942. His opinion states that a restaurant purchasing fish, for the purpose of cooking the same and serving meals to customers would be considered a consumer; that a meat market purchasing fish, for resale to customers, would be considered a retailer rather than a consumer; and that a fish dealer buying or handling fish secured from commercial fishermen or others, for the purpose of resale to a market, would be required to have a wholesale dealer's license.[60]

The Commission may issue a permit to the owner of a private pond to sell fish grown or cultivated by such owner under such regulations as the Commission may deem wise.[61] However, the private owner may not sell the fish to a licensed fish dealer who would in turn sell them to consumers or retailers.[62] This would violate the provisions of Chapter 123, Laws of 1932, and Section 5905, Mississippi Code Annotated, 1942, which provides:

> "It shall be unlawful for any fish dealer to buy, sell, or offer to buy and sell, or to knowingly have in his possession any of the game fish enumerated in this act whether taken from within or coming from without the State."

It appears from this ruling of the Attorney General that a person must personally sell any and all game fish taken from his lake to individuals or consumers and may not sell them in gross lots for re-sale. In view of the highly perishable nature of fish, this perhaps places an undue burden upon a person desiring to sell several thousand pounds of game fish when he is in the process of restocking his lake, under the supervision of the Game and Fish Commission. It is submitted that the sale of game fish in gross lots for re-sale should be allowed, and is justi-

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57*Ibid.*

58Mem. Op. Atty. Gen. (Letter Apr. 16, 1952).

59Hathorn v. State, 151 Miss 778, 119 So. 303 (1928); Ray v. State, 159 Miss. 887, 132 So. 755 (1931); Mem. Op. Atty. Gen. (Letter Oct. 29, 1945). See also Atty. Gen. Rep. 1937-1939 at p. 128 (Op. of Feb. 28, 1939).

60Mem. Op. Atty. Gen. (Letter Aug. 6, 1952).

61Miss. Code Ann. (1942) § 5903.

62Mem. Op. Atty Gen. (Letter June 26, 1952).

fied "under such regulations as the Commission may deem wise."[63] A sale would probably be allowed in gross lot to a restaurant for re-sale to the customers, for a restaurant is deemed to be a "consumer" for the purpose of buying fish.[64]

Conclusion

The game and fish laws of the State of Mississippi are comprehensive in their coverage and appear adequate at the present time. The game and fish laws are most often interpreted by the Attorney General, usually in an informal letter rather than an opinion, as there is little litigation on the subject. These interpretations are followed by the Game and Fish Commission, but there has been no widespread publication of these opinions. This causes hardship and delay on the part of persons who are in need of the latest construction of a particular law. It is suggested that a method be formulated for the future publication of any construction placed on the game and fish laws by the Attorney General. This could be done through the medium of the Game and Fish Commission.

George D. Warner, Jr.

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[63]*Supra*, note 60.
[64]Mem. Op. Atty. Gen. (Letter Aug. 6, 1952).

FORFEITURE UNDER INTERNAL REVENUE LAWS

The Internal Revenue Code of 1954 was presented as a complete overhaul of all our federal revenue laws.[1] However, considerable portions of the Internal Revenue Code of 1954 are substantial reenactments of prior revenue laws. The purpose of this article is to examine the present status of some of the laws relating to forfeiture of property for violation of the internal revenue laws, particularly as applied to intoxicating beverages.

The concept of forfeiture of property used in or intended for use in violating the internal revenue laws has been defended as necessary to insure collection of revenue essential for operation of the government.[2] Any argument controverting the use of this device as a means of insuring collection—as opposed, for example to more severe criminal punishments for breach, or some other method—could be addressed only to the legislative branch if the direct objective be within the Constitutional powers of the legislative branch. Hence, although a side product of the revenue measures has been considerable control by the federal government of the entire alcohol production and distribution industries, and goes far beyond the powers exercised by the federal government in this field prior to passage of the Eighteenth Amendment,[3] it is of no consequence here where the source of power to so regulate be found.[4]

Another reason given for the application of forfeitures in this field has been that liquor traffic is dangerous to the public health, safety and morals. While this danger clearly places the regulation of all traffic in liquor within the police power of the states[5] it would seem to be no source of power to the federal government.[6]

Historically, forfeitures were imposed following conviction of felony.[7] This has undergone such a complete reversal in the United States that forfeitures have been decreed and upheld in spite of acquittal, prior to the time the forfeiture action was brought, of the person who allegedly used the property in violating the internal revenue laws.[8] This proposition has been severely criticized by many legal writers,[9] but has never been reversed. The principal reasons for this seemingly anomalous situation are found in the fact that forfeiture is a civil proceeding, hence, the government satisfies the burden of proof by a preponderance of the evidence, it not being necessary to present proof of the violation of the

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[1]Statement of Hon. Daniel A. Reed, Chairman of the House Ways and Means Committee, 100 Congressional Record 3222, 17 March, 1954.

[2]Stutz v. Bureau of Narcotics, 56 F. Supp. 810 (N. D. Cal., 1944). "The law may be harsh, but this is not the first instance of severity in the collection of internal revenue and enforcement of revenue statutes. Needless to say, any appeal for relief must be addressed to Congress, not the Judiciary."

[3]Limited to control of the District of Columbia, Territories, Indian Tribes, foreign and interstate commerce.

[4]There is no constitutional objection to the penalty of forfeiture of an offending article. Waterloo Distilling Corp. v. U. S., 282 U. S. 577. (1931).

[5]Hart v. State, 87 Miss. 171, 39 So. 523 (1905).

[6]"Police power" is reserved to the individual states, as there is no grant thereof to Congress in the Constitution. Keller v. U. S., 213 U. S. 138 (1909).

[7]Historical background discussed in Dobbins Distillery v. United States, 96 U. S. 395 (1877).

[8]U. S. v. One Dodge Sedan, 113 F. 2d 552 (3rd Cir .1940).

[9]Multiple Punishment Under Double Jeopardy Rule, 31 Columbia L. R. 291 (1931); Statutory Penalties—A Legal Hybrid, 51 Harvard L. R. 1092 (1938).

internal revenue laws beyond reasonable doubt,[10] and proof of intent to defraud the United States of tax is not required for the offending article to be forfeited.[11] Further, adjudging forfeiture is within the discretion of the trial judge.[12] Thus an innocent purchaser of, say a 1954 Plymouth coupe from a used car lot, having no knowledge of the use previously made of the vehicle, or even the identity of its prior owner, would have no defense against a forfeiture action by the government if the vehicle had been previously used in violation of the internal revenue laws[13] (title passed to the government when the offending vehicle was used in the violation of the law), although he could subsequently seek remission of the forfeiture.[14] Likewise, the owner of a farm in, say Quitman County, who rents or leases it to a tenant might find part of that land forfeited to the United States Government if the tenant built and operated an illegal still on the premises.[15] Or the owner of a taxicab might find it forfeited if the driver carried a passenger to a bootlegger and brought him back with a bottle of whiskey on which the tax had not been paid.[16]

Perhaps a clearer concept of the distinction between a forfeiture and a punishment can be obtained by examining the traditional rights protected in criminal action that are not extended in libel for forfeiture. Besides burden of proof and reasonable doubt, already alluded to, the Fifth Amendment, so far as prohibiting comment on the failure of the claimant to testify, does not apply.[17] Seizure of the property without writ or warrant has been held no violation of the Fourth Amendment,[18] when the seizing officer was a witness to earlier use of the vehicle in violating internal revenue laws, even though there was no urgency. The theory is that no property rights exist in the property after the proscribed use in violation of the internal revenue laws, therefore no constitutional rights are abridged. It would seem, however, that until there be a judicial determination that the property is forfeited—regardless of whether that forfeiture relates back to the time of commission of the offense once it be decreed—the possibility of the existence of private rights in the property should be protected by the Fourth Amendment, for a seizure incident to a civil action is not in terms excluded from the application of that amendment, and no case so holding has been found; nor is the holding

[10]U. S. v. Regan, 232 U. S 37 (1914). But Government must produce substantial evidence and may not rely on mere surmise or conjecture. U. S. v. One Ford Coach, 1949 Model, 184 F. 2d 749 (4th Cir. 1950).

[11]7 Fifths Old Grandad Whiskey v. U. S., 158 F. 2d 37 (10th Cir., 1946). However in Vandevander v. U. S., 172 F. 2d 100 (5th Cir. 1948), the Court said: ". . . we do not know of any presumption of law that the presence of a quart of corn whiskey in the hands of a guest in an automobile, with no showing at all about the source or non-taxation of it, and with no intent proved except to drink it, demands a forfeiture of the automobile. . . ." Compare Busic v. United States, Ante Note 16.

[12]Jarrett v. United States, 184 F. 2d 532 (4th Cir., 1950).

[13]U. S. v. Plymouth Coupe (1941), 88 F. Supp. 93 (W. D. Pa. 1950), where the innocent purchaser bought from a private individual.

[14]Under 18 U. S. C. A. § 3617, or seek remission by administrative action under INT. REV. CODE (1954) § 7327.

[15]Dobbins' Distillery v. United States, *supra* note 8. See INT. REV. CODE (1954) § 5604.

[16]Busic v. U. S., 149 F. 2d 794 (4th Cir. 1945), U. S. v. One 1942 G. M. C. Tractor Truck, 182 F. 2d 278 (7th Cir. 1950).

[17]Kent v. U. S., 157 F. 2d 1 (5th Cir., 1946).

[18]Sanders v. U. S., 157 F. 2d 158 (5th Cir., 1953). A considerable list of supporting cases are cited in the opinion. See 27 Notre Dame Lawyer 642 (1952), criticizing a case holding forfeiture may not follow an illegal seizure.

in these cases grounded on such a theory, nor on any distinction based on the fact that forfeiture is a proceeding in rem. Since the issue of illegal search and seizure would come up on motion prior to a determination of the issue of forfeiture, it is submitted that the court could not assume that title in the property had passed to the government in ruling on the motion to suppress. And it would seem that the Court of Appeals should reverse the case on appeal even though the issue of forfeiture be correctly resolved in the government's favor, where the property was seized without a magistrate passing upon it prior to that seizure, for the Supreme Court has said that the Fourth Amendment is for the protection of both the innocent and the guilty,[19] and has also said that the Amendment applies to warrants under any statute, "revenue, tariff and all others."[20] It seems possible that since the proceeding is in rem, directed against the property itself, which property could have no constitutional rights, the question of the legality of the seizure might be avoided on this ground. At any rate, the Supreme Court has not yet passed on the question.

It appears that the number of "hard" cases depends largely on the discretion exercised by the Executive Department in determining when to bring an action to enforce forfeiture. Also, there does not appear to be any limitation in the laws or their application as to the value of the libeled property in relation to the unpaid tax or any other factor; a $15,000.00 truck and trailer rig would be forfeited just the same for a half pint of illicit whiskey as for a $70,000.00 trailer load. And present statutes seem broad enough to impose forfeitures[21] for any violation of revenue laws, such as the excise taxes on oleomargerine,[22] on jewelry,[23] perfume or cosmetics,[24] or even refrigerators[25] or electric

[19]Trupiano v. U. S., 334 U. S. 699 (1948). The Court actually spoke of the Fourteenth Amendment, however the case involved the Fourth as applied to a state through the Fourteenth.

[20]Nathason v. U. S., 290 U. S. 41 (1933).

[21]INT. REV. CODE (1954) § 7301:

"Property Subject to Tax

(a) Taxable Article.—Any property on which, or for or in respect whereof, any tax is imposed by this title which shall be found in the possession or custody or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of such tax, or which is removed, deposited, or concealed, with intent to defraud the United States of such tax or any part thereof, may be seized, and shall be forfeited to the United States.

(b) Raw Materials.—All property found in the possession of any person intending to manufacture the same into property of a kind subject to tax for the purpose of selling such taxable property in fraud of the internal revenue laws, or with design to evade the payment of such tax, may also be seized, and shall be forfeited to the United States.

(c) Equipment— . . .

(d) Packages— . . .

(e) Conveyances. — Any property (including aircraft, vehicles, vessels, or draft animals) used to transport or for the deposit or concealment of property described in Subsection (a) or (b) may also be seized, and shall be forfeited to the United States."

INT. REV. CODE (1954) § 7302:

"Property used in Violation of Internal Revenue Laws. It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. . . ."

[22]INT. REV. CODE (1954) § 7265 (a) (1) and (c) as to penalties for violation of regulations concerning oleomargarine, and § 7303 (3) as to forfeiture.

[23]INT. REV. CODE (1954) § 4001.

[24]INT. REV. CODE (1954) § 4021.

[25]INT. REV. CODE (1954) § 4111.

blankets.[26] The action is in the nature of a proceeding in rem[27] directed against the offending property itself without regard to the guilt or innocence of the owner, or the good faith of a subsequent purchaser as has already been said.[28]

The provisions of the Internal Revenue Code of 1954 specifically providing penalties, seizures and forfeitures relating to liquors, are found in Subchapter J. of Chapter 51; Sections 5601 to 5650 inclusive. These provisions are substantially the same as those of previous laws, but are conveniently grouped. The section in this subchapter most likely to be encountered in this state is Section 5640, which replaces Section 2803 (f) of the 1939 Internal Revenue Code, and will doubtless be interpreted the same.

Another key statute in the law of forfeitures was Title 26, Section 3321.[29] The penalty provision of this section has been placed in Section 7206 of the 1954 Internal Revenue Code, and the forfeiture provisions are now covered by Section 7301.[30] No apparent change in the law is noted, although there is some alteration in wording. Section 3321 and Section 3116 of the 1939 Internal Revenue Code overlapped, the latter being considered general, and more inclusive. In *United States v. One 1941 Buick Coach Auto*,[31] an automobile was driven by the owner to the place he had arranged to meet a third party for whom he had agreed to deliver moonshine. It was held the automobile was not forfeited under Section 3321, but that the evidence was sufficient for forfeiture under Section 3116, saying that Section 3116 "is all inclusive. No exception is made in the kind of property included therein, nor is there any limitation on the manner of use."[32] Such distinctions continue under the 1954 Internal Revenue Code.

The general provision most likely to recur frequently in forfeiture actions in this state is Section 7302 of the Internal Revenue Code of

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[26]INT. REV. CODE (1954) § 4121.

[27]INT. REV. CODE (1954) § 7323 (a).

[28]48 Harvard L. R. 684 is an interesting note on attempt to forfeit a vehicle used by John Dillinger.

[29]Title 26, § 3321 reads as follows:

"Removal or concealment with intent to defraud the Revenue:

(a) Penalty. Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000.00 or be imprisoned for not more than three years, or both.

(b) Forfeiture.

(1) Goods. Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited.

(2) Packages . . .

(3)Conveyances. Every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited."

[30]See note 21, *supra*.

[31]85 F. Supp. 402 (S. D. Ala. 1949).

[32]United States v. Windle, 158 F. 2d 196 (8th Cir. 1946). A vehicle was libeled under § 3116 for intent to violate statute laying a special tax on wholesale liquor dealers. The contention was made that § 3116 was not applicable, since § 3253 provided specific forfeiture provisions for such violations. The Court adjudged forfeiture under § 3116.

1954,[33] almost a verbatim reenactment of Section 3116 of the Internal Revenue Code of 1939, which has been in force in substantially the same form for a much longer time.[34] Unfortunately, this section has not received uniform interpretation in the District Courts and the Courts of Appeal, and the value of the property involved has seldom been sufficient to warrant appeals to the Supreme Court, so many questions arising under this section are controversial, and present results may vary depending solely on venue.[35] For example, a question existed for many years as to whether a vehicle used to transport the operator of an illegal still to and from the still was subject to forfeiture. The Government's contention was that the operator was as important to the illicit operation as the sugar or mash, and since any vehicle used to transport these commodities was unquestionably subject to forfeiture, the vehicle used to transport the operator should also be subject to forfeiture. In 1952, the Third Circuit, in *United States v. One 1948 Plymouth Sedan*,[36] held such a vehicle was used for the personal convenience of the operator, and was therefore not an instrumentality of the business so as to be subject to forfeiture. That same year the Sixth Circuit, in *United States v. One 1950 Ford Half Ton Pickup*,[37] held the vehicle forfeit under the same circumstances. The Supreme Court finally had a chance to settle this question the next year[53] when it sided with the Third Circuit.

But the Supreme Court did not put to rest the underlying problem of statutory construction which appears to be a decisive factor in all these cases. Some courts apply the rule that forfeitures are not favored in the law, and therefore statutes imposing them are to be strictly construed against forfeiture,[39] while others say forfeiture statutes are enacted to suppress a public wrong, and although they impose forfeitures, they should not be construed as penal laws generally, but should be construed fairly and reasonably so as to carry out the presumed intent of the legislature.[40] Then there is the third view which would decree the forfeiture under a liberal construction of the statute, then might remit it in a proper action by the innocent owner.[41] So the Supreme Court succeeded in laying only a specific, narrow question to rest.

Meanwhile, other questions are unsettled. In 1947, the Tenth Circuit, in *Von Patzoll v. United States*,[42] held that a vehicle used by a bootlegger to induce others to transport, or to assist in transporting liquor in violation of the internal revenue laws, was not subject to forfeiture.[43] In 1949, the United States District Court for the Southern District of Alabama, in *United States v. One 1941 Buick Coach Auto*,[44]

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[33]Quoted, note 21, *supra*.

[34]Title 26, § 3116 is derived from Act of Congress, August 27, 1935, C. 740, § 8, 49 Stat. 874.

[35]INT. REV. CODE (1954) § 7323 (a); Venue is place of seizure.

[36]198 F. 2d 399.

[37]195 F. 2d 357.

[38]U. S. v. Lane Motor Co., 344 U. S. 630 (1950).

[39]Following U. S. v. One 1936 Model Ford V-8 DeLuxe Coach, 307 U. S. 219 (1939).

[40]Following U. S. v. Ryan, 284 U. S. 167 (1931).

[41]U. S. v. One Plymouth Coupe, *supra*, note 13. U. S. v. One Ford Truck, 44 F. Supp. 415 (W. D. Pa. 1942), but this seems to involve a multiplicity of suits.

[42]163 F. 2d 221.

[43]Actually decided under the 1936 Liquor Enforcement Act.

[44]Note 31, *supra*.

declared that a vehicle driven by the owner to the place he had previously arranged to meet a third party for whom he had agreed to deliver some moonshine was subject to forfeiture. And in 1950, the Fourth Circuit decided, in *United States v. One Ford Coach, 1949 Model*,[45] that it was not an abuse of discretion to remit the forfeiture of a car used to transport an illegal dealer to the hideout where he stored whiskey on which tax had not been paid. Perhaps these cases are disposed of by the Lane Motor Co.[46] decision, under the theory that such use is also simply a matter of convenience, and the vehicle is not actually employed in the business so as to be subject to forfeiture. But where "convenience" becomes "employment" is not now clear. It has long been held that a convoy vehicle, itself carrying no contraband, is subject to forfeiture,[47] although there is perhaps authority to the contrary.[48] The analogy often drawn is that the convoy vehicle is like the horse drawing the cart. However, after the Lane Motor Co. decision, a District Court in the Fifth Circuit considered that decision as reversing the prior "convoy cases," and dismissed the libel against automobile used as convoy or decoy for a truck transporting non-taxpaid whiskey.[49] The Fifth Circuit, in a split decision, reversed the trial court. The majority applied a liberal construction to Title 26, Section 3116,[50] and said that this statute does not place any express limitation on the manner in which property intended for use in violation of the revenue laws be employed, nor does that statute in terms require that the contraband article be carried in the automobile.[51] Hutcheson, Chief Judge, dissenting, considered the District Court correct, arguing that the vehicle could not be an in rem violator since it was not hauling or otherwise harboring contraband. He said Section 3116 had a double aspect with both civil and criminal sanctions, and suggested that the majority was not giving effect to the distinction between the two. It is puzzling to note that the same Court —in an opinion written by the Judge joining in the majority opinion in this case—had held a year before that a vehicle equipped with air-horns and used to warn operators of an illegal still of an approaching raid was not subject to forfeiture.[52] In this case, the majority opinion dismissed the earlier case as involving an entirely different factual situation.

Whether Chief Judge Hutcheson is right in his analysis that a mistake is made in intermixing civil and criminal aspects of Section 3116, or whether the split is in how forfeiture statutes should be con-

[45]184 F. 2d 749.

[46]Note 38, *supra*.

[47]U. S. v. One Dodge Sedan, 28 F. 2d 45 (D. Calif. 1928); U. S. v. One 1950 Model Willys Jeep, 91 F. Supp. 822, (W. D. S. C. 1950).

[48]U. S. v. One Studebaker Sedan, 56 F. Supp. 809 (E. D. Pa. 1944). The Court distinguished between use as a "lookout" and as a "convoy" without defining either term, but appears to bottom the decision on the fact that the vehicle was not used to transport contraband.

[49]U. S. v. One 1952 Lincoln Sedan, 213 F. 2d 786 (5th Cir. 1954). The District Court apparently considered the vehicle not subject to forfeiture because used merely to aid and abet, and not for actually concealing or carrying any of the forbidden articles.

[50]Substantially INT. REV. CODE (1954) § 7302—See note 22, *supra*.

[51]This language would certainly seem broad enough to include the vehicle used to carry the still operator to and from the still, the situation in U. S. v. Lane Motor Co., *supra*, note 38.

[52]U. S. v. Jones, 194 F. 2d 283 (5th Cir. 1952), stating the statute (Title 26, Sec. 3116) had not been extended to include such use, and citing U. S. v. One Studebaker Sedan, *supra*, note 38, as authority.

strued, his test—simply whether the property was used to transport, conceal, or harbor contraband, would end the diversity, although it might limit the effectiveness of a powerful device for controlling an illegal, but highly profitable and rather extensive, activity.

Two other sections of the Internal Revenue Code of 1954 are so closely related to this brief discussion that they should be mentioned, but both invite discussion that will not be undertaken here.

Section 3724 of old Title 26, establishing a procedure for administrative forfeiture of property valued at $500.00 or less, has been reenacted with[53] minor changes in wording that do not seem to change its operation or effect, except that it has been extended to cover personal property valued at $1,000.00 or less so as to reduce the volume of cases necessitating court action. Where proper bond is made, any person claiming the goods will compel court adjudication.[54]

A provision new to the Internal Revenue Code, Section 7327,[55] provides a complete procedure for administrative remission of forfeiture as an alternative to court action[56] under Title 18, Section 3617, as that statute has been sometimes construed.[57] It may also introduce equity into the effect of some forfeiture laws by extending relief to the person who makes substantial compliance with the conditions precedent to remission[58] established in Title 18, Section 3617, which courts have been reluctant to do.[59]

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[53]INT. REV. CODE (1954) § 7325.

[54]Under Subsection (3). Bond remains set at $250.00.

[55]The provisions of the customs law referred to is as follows: Title 19 § 1618. "Remission or Mitigation of Penalties. Whenever any person interested in any vessel, vehicle, merchandise or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws, and with the Secretary of the Treasury if under the customs laws, and with the Secretary of Commerce if under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the permission or mitigation of such fine, penalty, or forfeiture, the Secretary. . . . if he finds that such fine, penalty, or forfeiture was incurred without wilful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation, or of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission to any customs agent, collector, judge of the U. S. Customs Court, or U. S. Commissioner, to take testimony upon such petition: provided, that nothing in this Section shall be construed to deprive any person of an award of compensation made before the filing of such petition."

[56]But the Secretary's discretionary action will not be subject to mandamus. U. S. v. Mellon, 40 F. 2d 808 (1930).

[57]Originally designed to protect the innocent lienor, Title 18, § 3617 has been construed as enacted to afford relief to the innocent owner or bailor. For example, see U. S. v. One 1946 Mercury Sedan Automobile, 100 F. Supp. 957 (N. D. Ga. 1951),

[58]"Compliance with all conditions precedent set up by the remission statute must be proved by a claimant before a District Court has any right to remit or mitigate a forfeiture." U. S. v. Federal Credit Co., 117 F. 2d 341 (5th Cir. 1941).

[59]". . . it is quite true that under the evidence in this case it might appear inequitable to enforce the strict letter of the law against this particular claimant. The District Court obviously believed this to be true. However, we are here dealing with power instead of equity. . . ." U. S. v. National Discount Corporation, 104 F. 2d 611 (7th Cir. 1939).

EQUITABLE RELIEF FROM USURIOUS CONTRACTS IN MISSISSIPPI

Fundamental in the law of equity is the maxim: "He who seeks equity must do equity."[1] The clear mandate laid down in this maxim is jealously guarded and invariably observed in courts of equity by the payment of at least lip-service. Although the principal is elemental, the actual application of the maxim may be a matter of some difficulty in many cases.

In at least one field of equity law in Mississippi, the meaning of the requirement of "doing equity" has been subject to long-standing confusion. In cases in which the obligor of an usurious contract seeks equitable relief therefrom, usually by way of injunctive action, there remains a seemingly unsettled question as to what he must do in order to "do equity." This situation exists despite a line of unqualified decisions by the Mississippi Supreme Court, interpreting a seemingly clear usury statute.[2] However, the several decisions have been superficially conflicting and have thereby been unsatisfactory in resolving the question.

The cases in which the question has arisen have involved debtors seeking relief from a contract calling for interest at a rate illegal under the Mississippi usury statute[3] or under the statute controlling in the case of foreign contracts. In all of these cases, the primary question for consideration was whether, in order to meet the requirements of "substantial restoration" or "doing equity," the complainant must tender the principal amount plus interest at the legal rate or whether he need tender the principal only.

Early in the history of the Mississippi Supreme Court the problem was met. In *McRaven v. Forbes*,[4] it was stated that the complainant must tender both principal and legal interest in order to seek the aid of a court of equity for relief from a usurious contract. The decision in that case did not rest upon this point, and therefore, later cases involving tender in such suits have not used this decision as authority.

Only a few years after the *McRaven* case, the court, in *Parchman v. McKinney*,[5] was unequivocal in its decision that a complainant need tender only principal in order to obtain equitable relief from a usurious contract. It was there stated that inasmuch as the Mississippi usury statute forfeits all interest in case the rate is found to be illegal under the provisions of that statute, courts of equity should not require tender of interest in any amount in order to seek the court's action.[6]

Following *Parchman v. McKinney*,[7] the matter seemed settled insofar as this state was concerned. In two cases—*Norcum v. Lum*[8] and *Long*

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[1] GRIFFITH, MISSISSIPPI CHANCERY PRACTICE, § 43 (1925); 2 LAWRENCE, EQUITY JURISPRUDENCE § 1087 (1929).

[2] MISS. CODE § 36 (1942).

[3] *Ibid.*

[4] 7 Miss. (6 How.) 569 (1842).

[5] 20 Miss. (12 Smedes & M.) 631 (1849).

[6] The court went on to say that although the general rule allows partial payments to be applied first to accrued interest, this rule does not sustain when the interest rate is illegal. *Id.* at 640.

[7] *Supra* note 5.

[8] 33 Miss. 299 (1857).

v. McGregor[9]—the court reached the same conclusion in suits involving substantially identical factual situations. In the *Long* case, it was admitted that the general rule in this country was to require a tender of both principal and interest at the legal rate; but, since the contrary rule had been well established in this state for many years, the court was of the opinion that it should not be altered. It appears from this declaration that the Mississippi Supreme Court was not completely convinced of its position on the matter, but felt that it was bound and justified by precedent.

In 1892, the court appeared to reverse the position previously taken by it in *Parchman v. McKinney*[10] and cases following it, when it held in *American Freehold Land & Mortgage Co. v. Jefferson*[11] that the tender of both principal and interest at the legal rate is required when relief is sought in a court of equity. However, in that case Judge Cooper attempted to distinguish the *Parchman* case rather than to overrule it. In the *Jefferson* case, the notes in question were made by a Tennessee resident, payable to a New York corporation, secured by a deed of trust on land situated in Mississippi, and calling for payment in New York. The stipulated interest rate was usurious in both New York and Tennessee. Suit was brought by the debtor in chancery court in Mississippi to enjoin the sale of the land under the deed of trust. The Mississippi Supreme Court said that since the interest rate was illegal in the place of the making of the contract and in the place of performance, it would be held illegal in an action in this state. The court then held that because the contract was foreign, it was proper to require the tender of principal and legal interest. Therefore, the rule was laid down that, in actions for equitable relief from foreign contracts, the general or majority rule as to tender in such cases would be applied, and not the more liberal rule as set out in earlier cases in this state.

Again, in *Salter v. Embry*,[12] a deed of trust on land in Mississippi was executed to secure notes made in Tennessee which called for interest at an illegal rate under the laws of the latter state. In that case, the court followed *Mortgage Co. v. Jefferson*[13] in holding that, in order to seek the aid of a court of equity, there must be a tender of both principal and interest at the legal rate.

Only a few years after *Salter v. Embry*,[14] the Supreme Court was once more faced with the question at hand in *Southern Home Building and Loan Ass'n v. Tony*.[15] Here, a deed of trust supported notes calling for interest at a usurious rate; however, in this case, unlike the situation in the *Salter* and *Jefferson* cases, the contract was made and payable in Mississippi, even though a foreign loan company was involved. The court followed the decisions in *Parchman v. McKinney*[16] and *Long v. McGregor*[17] in holding that the effect of our statute forfeiting all interest where usury is found to exist would be nullified by

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9 65 Miss. 70, 3 So. 240 (1887).
10 *Supra* note 5.
11 69 Miss. 770, 12 So. 464 (1892).
12 18 So. 373 (1895).
13 *Supra* note 11.
14 *Supra* note 12.
15 78 Miss. 916, 29 So. 825 (1901).
16 *Supra* note 5.
17 *Supra* note 9.

requiring the tender of interest at any rate. The court recognized the necessity of doing equity in order to seek equity, but went on to ask, ". . . can there be any equity in any person to receive that which the law forbids him to take?" There was no mention made of the more recent *Salter* case; however, it was stated that the *Jefferson* case did not overrule the *Parchman* case, but no reasoning was given for this conclusion.

Three other cases less important on the point under consideration bring up to date the rule in Mississippi as to the requirements of tender before relief will be given in a court of equity from a usurious contract. In *Purvis v. Woodward*,[18] it was held that it is sufficient to offer to pay any amount which should, by a future accounting, be shown to be legally due. However, in *Crittenden v. Ragan*,[19] it was held not to be sufficient tender merely to make requests for an accounting. There must be some actual tender by the obligor of "what he admits in good faith to be due, offering, moreover, to pay whatever shall be ascertained to be legally due." And, following these two cases was *Rush v. Pearson*[20] which reached the same general conclusion. These three cases in no way resolve the problem, but only determine the requirements of tender when an accounting is necessary in order to determine the amount due.

The preceding chronological survey of the cases involving the problem under consideration gives an immediate impression of contradiction and confusion as to what is required in this state to gain the action of a court of equity in seeking relief from a usurious contract. What will be considered by the chancery courts and the supreme court of this state to be sufficient tender when a case involving this question again arises? Analysis of the cases to date shows that they fall into two categories: Those which involve foreign contracts, usurious under the laws of the state in which they are made or are to be performed, and those involving domestic contracts which call for interest at a rate illegal under Mississippi law. In the first category are *Mortgage Co. v. Jefferson*[21] and *Salter v. Embry*,[22] while in the second category are *Parchman v. McKinney*,[23] *Long v. McGregor*,[24] and *Building and Loan Ass'n v. Tony*.[25]

Despite apparent conflict, there still remains a basic rule in Mississippi on this point. In order to obtain relief in a court of equity from a usurious contract, the complainant need tender only the principal amount of the debt in order to meet the requirement of "doing equity" when "seeking equity." The alternative rule that there must be a tender of both principal and legal interest is applied only in those "exceptional" cases where the action is on a foreign contract.

Inasmuch as the cases mentioned resolve themselves into two definite rules, a better consideration of the subject may be effected by examining the background and logic of these rules separately.

The rule of tender to be applied in equitable actions by the debtor

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[18] 78 Miss. 922, 29 So. 917 (1901).
[19] 89 Miss. 185, 42 So. 281 (1906).
[20] 92 Miss. 153, 45 So. 723 (1907).
[21] *Supra* note 11.
[22] *Supra* note 12.
[23] *Supra* note 5.
[24] *Supra* note 9.
[25] *Supra* note 15.

for relief from a usurious foreign contract was established in 1892 in *Mortgage Co. v. Jefferson.*[26] In that case, the court was apparently reluctant to accept the theory set out in the *Parchman* case that our usury statute,[27] by imposing a forfeiture in cases of illegal interest, excuses a tender of legal interest as a prerequisite to equitable relief. Despite this reluctance, Judge Cooper admitted that public policy in this state may dictate that a court of equity cannot require what the statute declares illegal. However, the court stated that in cases arising out of foreign usurious contracts, a different rule should be applied, declaring that there was no reason to apply the public policy of this state to contracts made in or to be performed in another state. It was then determined that in such cases, the general or majority rule (and not the rule of any particular jurisdiction) should be applied.[28]

The reasoning and conclusion of the court are rather unsatisfactory since they are founded on no law and seem aimed solely at partially aligning the Mississippi rule with the majority rule. However, the conclusion is correct in one respect—when foreign usurious contracts are involved in an action, a different rule should be applied, but it should be the rule of another jurisdiction and not merely the general or majority rule. The court did not recognize or discuss the question of conflicts of laws which could have, and should have, been the controlling factor in determining that a different rule should be applied to tender in actions in equity.

The rule of substantial restoration as a condition precedent to equitable relief is a rule of substantive law and not merely a rule of procedure.[29] For this reason, if a foreign contract is involved, the law of a foreign jurisdiction must be applied in determining what a court of equity should require to be tendered by the debtor-complainant.[30] There are several approaches to deciding what law controls: the law of the place where the contract was made or the law of the place where the contract was to be performed, or possibly the law of some other place.[31] Where the place of making and the place of performing the contract differ, the law of the place of performance has been said to govern in the courts of Mississippi.[32] We see then that the court in the *Jefferson* case was justified in applying the rule as to tender applicable in a foreign jurisdiction. However, the contract in that case was to be performed in New York, and the rule of substantial restoration used in that state should have been applied. In that state, the borrower need not tender either principal or interest in order to obtain equitable relief from a

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[26]*Supra* note 11.

[27]*Supra* note 2.

[28]"The conscience of the court, its appreciation of what is just and equitable, not only here but in New York and Tennessee, and everywhere, is the sole and sufficient test as to terms upon which it will afford relief." Mortgage Co. v. Jefferson, *supra* note 11.

[29]2 LAWRENCE, EQUITY JURISPRUDENCE § 756 (1929).

[30]2 BEALE, CONFLICTS OF LAWS § 584.1 (1935). The conflicts rule sustains regardless of the fact that the contract may concern land located in the state of the forum. *Id* § 346.

[31]STUMBERG, CONFLICTS OF LAWS P. 200 (1937). Stumberg suggests that at least four methods of approach have been used in determining the validity of a foreign contract: ". . . by reference to the law of the place of making; by reference to the law of the place of performance; by reference to the intention of the parties; by reference to law of the place of making or of performance, if either law will uphold the valdity of the contract."

[32]Nat. Bank of Iowa City v. McGrath & Sons, 111 Miss. 872, 72 So. 701 (1916).

usurious contract.[33] It therefore appears that the court had no basis in the rules of conflicts of laws for requiring a tender of both principal and interest, unless the law of the place of making the contract (Tennessee) should have been chosen to be applied in this particular case. The Mississippi Supreme Court should undoubtedly apply the rule of the foreign jurisdiction as to tender as a prerequisite of equitable relief in actions involving foreign contracts; but it would be preferable if they should do so upon the established rules of conflicts of laws and not on the basis of what is the general rule as to tender.

To reiterate, the general rule in this state as to what is required in order to obtain relief in equity from a usurious contract was founded upon our statute forfeiting all interest when a rate greater than the legal rate shall be called for.[34] It has been reasoned that inasmuch as one of the cardinal maxims is that equity follows the law, a court of equity cannot demand that which the law requires to be forfeited.[35] It has been said that to require more than the tender of principal would act to nullify the effect of our usury statute.[36] But, does the statute imposing the forfeiture dictate the rule of tender in courts of equity?

The forfeiture clause of the Mississippi usury statute is in no sense unique to this state.[37] Many jurisdictions have been able to retain the general requirement of tender of both principal and legal interest in the face of statutes forfeiting all interest,[38] imposing penalties,[39] or even declaring the obligation absolutely void[40] where interest at a usurious rate is stipulated. The courts requiring tender of interest despite statutes which would seemingly make such tender unnecessary follow substantially the same line of reasoning to reach that result. The unquestioned maxim that "he who seeks equity must do equity" is said to demand that the other party be put in *statu quo* insofar as is possible even to the extent of doing what the law might make unnecessary.[41] Statutes forfeiting all interest, imposing penalties, or voiding the contract when usury is discovered are generally held to grant legal rights to a defendant-debtor in an action by a creditor. However, "courts of equity do not view the statute as courts of law are compelled to do. If the borrower goes into equity in respect to a security given in connection with the usurious contract, or to avoid extortion or oppression, the court will compel him to pay the principal and legal interest, because there is a moral obligation resting on him to do so, and it is equitable that he should be compelled to do it."[42]

The statute in this state concerning usury, after prescribing the legal rate of interest, provides:

"And if a greater rate of interest than eight percentum shall

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[33]19 McKINNEY'S CONSLD. L. of N.Y. § 377.

[34]MISS. CODE § 36 (1942).

[35]Parchman v. McKinney, *supra* note 5.

[36]Building & Loan Ass'n v. Tony, *supra* note 15.

[37]See Note, 17 A.L.R. 123 (1922); Note 70 A.L.R. 693 (1931).

[38]Plitt v. Kaufman, 188 Md. 606, 53 A.2d 673 (1947); Carey v. Hooker, 171 N.C. 229, 88 S.E. 236 (1916).

[39]Jonas v. Home Mortg. Co., 205 N.C. 89, 170 S.E. 127 (1933); Goodwin v. Nat. Discount Corp., 5 Wash.2d 521, 105 P.2d 805 (1940).

[40]Crisman v. Corbin, 169 Ore. 332, 128 P.2d 959 (1942).

[41]2 LAWRENCE, EQUITY JURISPRUDENCE § 756 (1929).

[42]Welch v. Woodward, 30 Conn. 149, 79 Am. Dec. 239 (1861).

> be stipulated for or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract be executed or executory."[43]

Although this statute is explicit in the legal rights, remedies and defenses afforded a debtor, it does not concern itself with the rights of the debtor in actions for relief in equity. The debtor may recover usurious interest which he has paid by a suit at law,[44] or may assert the usury as a defense in an action by the creditor;[45] but in an action in equity by the debtor, it is only right and equitable that he be required to pay what could have been required had the contract been valid. To allow the debtor to obtain relief without the tender of any interest would allow him to use the creditor's money gratuitously by merely bringing an action in equity. It is not unconscionable to construe "he who seeks equity must do equity" to require more to be done when affirmative relief from the effects and operation of a usurious contract is asked than under other circumstances.

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[43]Miss. Code § 36 (1942).
[44]O'Conner v. Clopton, 60 Miss. 349 (1882).
[45]Hardin v. Grenada Bank, 182 Miss. 689, 180 So. 805 (1938).

EMPLOYEE OR INDEPENDENT CONTRACTOR?

In ascertaining whether or not a recovery of compensation should be allowed under workmen's compensation law, it is necessary to determine the employment status of the injured person. Recovery will be allowed if the injured person was an employee; but, if the employment status was that of an independent contractor relationship, no recovery can be had. A distinction between an employee and an independent contract must necessarily be drawn in any treatment of this subject. In order to make such a distinction, the courts have adopted certain tests. The purpose of this article is to state and explain these tests.

The courts have been unable to formulate a concise definition of the terms "employee" and "independent contractor" that will furnish an accurate test to be applied in determining whether one acting for another is a servant or an independent contractor.[1] Legislative bodies have only added to the confusion. The workmen's compensation acts of the several states make no attempt to define an "independent contractor" and only give a general definition of an "employee" as one in the service of another under any contract of hire, either express or implied.[2] The Restatement of the Law of Agency makes the following statement of the master, servant and independent contractor relationship:

> "(1) A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
>
> "(2) A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
>
> "(3) An independent contractor is a person who contracts with another to do something for him, but who is not controlled by the other, nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."[3]

However, the above statement is inadequate when applied to the problem of determining whether the relationship of the person employed is that of a servant or an independent contractor. This obviously indicates that there exists other factors to be considered relative to this problem.

The Restatement of the Law of Agency states that the following matters of fact, among others, are considered in determining whether one acting for another is a servant or an independent contractor:

> "(a) The extent of control which, by the agreement, the master may exercise over the details of the work;
>
> "(b) whether or not the one employed is engaged in a distinct occupation or business;

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[1]Kughn v. Rex Drilling Co., 217 Miss. 434, 64 So. 2d 582 (1953).

[2]The Mississippi Workmen's Compensation Law as enacted under House Bill No. 351, Regular Session 1948, and as amended under House Bill No. 433, Regular Session 1950, § 2 (4).

[3]RESTATEMENT, AGENCY § 2 (1933).

"(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

"(d) the skill required in the particular occupation;

"(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

"(f) the length of time for which the person is employed;

"(g) the method of payment, whether by the time or by the job;

"(h) whether or not the work is a part of the regular business of the employer; and

"(i) whether or not the parties believe they are creating the relationship of master and servant."[4]

The factors enumerated above were developed by the common law to determine whether one acting for another was a servant or an independent contractor relative to the vicarious tort liability of the master. It should be kept in mind that the purpose for allowing recovery under workmen's compensation is different from that of common law tort. The courts in dealing with this problem as it affects workmen's compensation law have, nevertheless, applied the common law tests; and, in many instances, this has resulted in the courts losing sight of the real purpose of the workmen's compensation law.

The solution to a problem involving an employee or independent contractor relationship consists usually of listing the generally accepted tests or factors and applying them to the particular fact situation. Each cast must be considered upon its own facts, and, thus the result reached will depend upon the weight given to each factor in relation to the particular factual situation by the trier of facts. An individual factor, alone, is not conclusive, and thus cannot be applied as a separate test.

Larson, in his treatise on the Workmen's Compensation Law, suggests[5] that instead of listing the individual tests, the generally accepted factors should be "grouped under the two major and controlling distinctions to which they are subordinate: the control test, and the relative nature of the work test." He considers the problem as follows:

"Under the control test are considered the subordinate items from which right to control is usually inferred: direct evidence of right of control, of course, and exercise of control; right of termination; method of payment; and who furnishes equipment. Under the relative nature of the work test are considered: whether the work done is an integral part of the employer's regular business; and whether the worker, in relation to the employer's business is in a business or profession of his own."[6]

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[4]RESTATEMENT, AGENCY § 220 (1933).
[5]LARSON, WORKMEN'S COMPENSATION LAW § 43.53 (1954).
[6]*Ibid.*

After an analysis of the cases on the subject, Larson's approach seems to be a logical and practical one. The courts seem to be attempting to solve the problem of using the two distinctions suggested by Larson above. The older control test has become a rule of law; and, with the need for liberalization in order that the full purpose of workmen's compensation can be realized, courts are beginning to utilize a new test, the relative nature of the work test. However, the shift of emphasis from the control test to the newer nature of the work test by the courts is not on the basis of announced theory, but on the basis of the implications of the actual fact decisions themselves.[7]

Now that the two major tests and their respective subordinate items have been stated, there remains for discussion the numerous explanations of these two distinctions.

It is difficult, and perhaps impossible, to understand the control test without first drawing a distinction between the right of control and the exercise of control. The exercise of control is not conclusive when considered alone, but it is only evidence of the right of control. The right to control, rather than the fact that the employer does control, determines the status of the parties as employee and employer under workmen's compensation law.[8]

Some of the reported cases involve factual situations wherein the employer had the right to exercise control, and where this was true, the courts have held the employment status to be that of an employee. The holding in the case of *Industrial Commission v. Meddock*[9] is illustrative of this view. Quarrymen were employed under written contracts with the owner of certain sand and rock quarries, whose regular business was operating a quarry to quarry flagstone and building rock of specified quality at a stated price per ton, depending upon quality and payable bimonthly, were "employees" of the quarry owner within workmen's compensation act, and not independent contractors, in view of employer's right to control their work as a result of the right to terminate the contract on one day's notice and other terms of contract. In accord with this decision is the case of *Bowser v. State Industrial Accident Commission*[10] where a log hauler, who furnished his own truck and hauled logs for a logging company at stated prices per thousand, but who was subject to control of logging company which could terminate the relationship at will without liability, who was not required to do specific

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[7]Gordon v. New York Life Insurance Co., 300 N. Y. 652, 90 N. E. 2d 898 (1950).

[8]Industrial Commission v. Meddock, 65 Ariz. 324, 180 P. 2d 580 (1947); Perguica v. Industrial Accident Commission, 29 Cal. 2d 857, 179 P. 2d 812 (1947); Hillen v. Industrial Accident Commission, 199 Cal. 577, 250 P. 570 (1926); Bituminous Casualty Corporation v. Wilkes, 77 Ga. App. 464, 49 S. E. 2d 916 (1948); Lamb v. Meyer, Inc., 70 Idaho 224, 214 P. 2d 884 (1950); Murrelle v. Industrial Commission, 382 Ill. 128, 46 N. E. 2d 1007 (1943); Schroeder v. American National Bank, 154 Kan. 720, 121 P. 2d 186 (1942); Janofski v. Federal Land Bank, 302 Mich. 124, 4 N. W. 2d 493 (1942); Tokash v. General Banking Co., 349 Mo. 767, 163 S. W. 2d 554 (1942); Firestone v. Industrial Commission, 144 Ohio St. 398, 59 N. E. 2d 147 (1945); Bowser v. State Industrial Accident Commission, 182 Ore. 42, 185 P. 2d 891 (1947); Halliburton v. Texas Indemnity Insurance Co., 147 Tex. 133, 213 S. W. 2d 677 (1948); York v. Industrial Commission, 223 Wis. 140, 269 N. W. 726 (1936); Bourgeois v. Cacciapuoti, 138 Conn. 317, 84 A. 2d 122 (1951); Federated Mutual Implement and Hardware Insurance Co. v. Elliot, 88 Ga. App. 266, 76 S. E. 2d 568 (1953); Carnes v. Industrial Commission, 73 Ariz. 264, 240 P. 2d 536 (1952).

[9]65 Ariz. 324, 180 P. 2d 580 (1947).

[10]182 Ore. 42, 185 P. 2d 891 (1947).

piece of work but only such as the company could provide from day to day when it wanted to operate and who rendered services exclusively for the company, was an "employee" rather than an independent contractor. A Georgia court held, in the case of *Federated Mutual Implement and Hardware Insurance Co. v. Elliott,*[11] a plasterer to be an "employee" because the employer reserved the right to tell him what to do and to supervise the work. The court in Arizona described the rule, as laid down in *Carnes v. Industrial Commission,* in the following language:

> "The kind of control referred to as the control test is not the dictation of the thinking and manner of performing work by a skilled artisan or engineer or professional person; it is enough if the employer has the right to direct the time, place, degree, and the person for whom they are to be performed."[12]

Thus, if an employer does not exercise control over the one employed, but has the right to exercise such control, then this will be enough to make the employment status that of "employee." This contention is supported by *Bourgeois v. Cacciapuoti,*[13] a Connecticut case, where the employer had decided to erect a public hall and gymnasium on his property and directed the location of the fixtures. In holding that the installer of the heating and plumbing fixtures was an independent contractor, the court reasoned that "the real test is whether the employer has the right to control, not actual control and direction." Therefore, the right of control, not the exercise thereof, is the test.[14]

There are many reported cases involving extent of control of the details of the work. The authority seems to support the proposition that the test to determine whether one doing work for another is an independent contractor or an employee, within workmen's compensation law, is whether the alleged employer retains control over the method of reaching the required result or whether his control is limited to the result reached, leaving the method to the other party.[15] If the employer retains control over the method of reaching the required result, the employment status is that of employee; but, if his control is limited to the end result, the employment status is that of independent contractor.

The court held, in the case of *Nash v. Meguschar,*[16] that an owner

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[11]88 Ga. App. 266, 76 S. E. 2d 568 (1953).

[12]73 Ariz. 264, 240 P. 2d 536 (1952).

[13]138 Conn. 317, 84 A. 2d 122 (1951).

[14]C. E. Adams and Co. v. Harrell, 257 Ala. 25, 57 So. 2d 83 (1952).

[15]Industrial Commission v. Navajo County, 64 Ariz. 172, 167 P. 2d 113 (1946); Ozan Lumber Co. v. Garner, 208 Ark. 645, 187 S. W. 2d 181 (1945); Nash v. Meguschar, 228 Ind. 216, 91 N. E. 2d 361 (1950); Murphy v. Tremont Lumber Co., 22 So. 2d 79 (La. App. 1945); Petrow and Giannou v. Shewan, 108 Neb. 466, 187 N. W. 940 (1922); Beach v. Velzy, 238 N. Y. 100, 143 N. E. 805 (1924); Simonton v. Morton, 275 Pa. 562 (1923); *But see* Schneider v. Village of Shickley, 156 Neb. 783, 57 N. W. 2d 527 (1953) which makes an exception to the general rule. Decedent lived in Geneva where he operated his own electrical repair shop. The Village of Shickley, which owns an electrical distribution system, hired decedent to perform all necessary services to maintain the system. He was to answer all calls as soon as possible. The work he was to perform was neither fixed as to time nor amount. He was paid an hourly wage. The village furnished the supplies and he furnished the tools. Although the court conceded that the village was not interested in the details of how and when the work was to be performed, but only interested in securing a reasonably prompt and satisfactory result after telling decedent of the work it wanted performed and where, it, nevertheless, held the worker to be an employee.

[16]228 Ind. 216, 91 N. E. 2d 361 (1950).

of a truck, who was hired under contract by which the owner agreed to yard and haul timber at times of his own choosing, furnish his own tools and equipment, and employ his own assistants and pay them out of his own funds, was an independent contractor. They reasoned that when a person employing may prescribe what shall be done, but not how it is to be done or who is to do it, the person so employed is an independent contractor and not a servant; and the fact that the work is to be done under direction and to satisfaction of certain persons representing the employer does not render the person who contracted to do the work a servant. The doctrine of this case is further extended when applied to the following factual situation: By the terms of a contract, a lumber company agreed to pay deceased $6 per one hundred feet for timber cut and delivered at railroad tracks, and provided that work must not be sublet as a job, an that it should be done under supervision and direction of the lumber company. In holding the deceased to be an independent contractor, the court said in the case of *Medford Lumber Co. v. Mahner*[17] that the reservation of the right of supervision and direction related to the ultimate result, and not to the details of the work. This view is affirmed by a Georgia court on a similar factual situation where it was said in the case of *Alexander-Bland Lumber Co. v. Jenkins*[18] that the "control was only to ensure the end product." A Mississippi court, in dealing with this problem, held that directions as to the length and diameter of logs to be cut and inspection once or twice a week by the company did not make the relationship one of employment.[19] Where the end result is the significant factor of the control of the work, the following recent cases follow the established doctrine in finding an independent contractor relationship: *Fahey v. Terp*;[20] *Johnson v. Haskell Lemon Construction Co.*;[21] and *Butts v. State Industrial Accident Commission*.[22] Some of the reported cases discussed above, state the rule to be that where the employer is interested only in the net result of the work, an independent contractor relationship exists. The majority goes even further and says that if the control relates to the ultimate result, the employment status is that of independent contractor. This latter view is much broader and the courts by applying it can find an independent contractor relationship, although, in many instances several elements of control are present.

Several recent cases discuss the extent of control of the details of the work and describe the amount of control necessary to make a worker an employee. The Alabama court in the case of *C. E. Adams & Co. v. Harrell*[23] held that a truck driver who owned his own truck and paid all expenses was an employee because he was subject to control of the employer at the point of loading chert and at the point of delivery. Held as an employee a truck owner, who was paid by the amount hauled, subject to supervision at loading pits, was told when to start to work

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17197 Wis. 35, 221 N. W. 390 (1928); *Contra,* Ryder v. Johnson, 313 Mich. 702, 22 N. W. 2d 43 (1946). One farmer asked his neighboring farmer, who owned a combine, to cut his wheat, specifying only that straw should be cut long and that the wheat should not be cut until ripe. The farmer operating the combine was held to be an employee.

1887 Ga. App. 678, 75 S.E. 2d 355 (1953).

19Carr v. Crabtree, 212 Miss. 408, 55 So. 2d 408 (1951).

20235 Minn. 432, 51 N. W. 2d 273 (1952).

21262 P. 2d 142 (Okla. 1953).

22193 Ore. 417, 239 P. 2d 238 (1952).

23257 Ala. 25, 57 So. 2d 83 (1952).

and when to quit, and not to stop for refreshments or lunch, but to bring his lunch with him so that he could eat without delaying the operation.[24] When a truck owner, even with a helper, is hired to do extra hauling, which is not a definite part of any particular job, he is an employee although paid on a piecework basis.[25] The contract between the appellant and the contractor referred in general terms to unloading, assembling, stenciling, removing from storage and loading on railroad cars, and provided in several instances that such work is to be done in accordance with Government requirements; it further provided for the performance of such other work incident to the aforesaid operations as should be requested by the company. In deciding a case arising out of this contract and affirming a prior case,[26] the court in *Pennsylvania Railroad Co. v. Barlion*[27] summarized the controlling facts and circumstances relative to control of details as follows:

> . . . "In *Roth* case, the court pointed out that the employment of the contractor was general, that the number of cars to be unloaded or reloaded depended upon demands of the business, that the work was to be done when, where, and in the proportions as the needs of the railroad company might justify, that the railroad company controlled the place where the work was to be performed and in which it was to be performed and in which there was a frequent movement of cars, and that no part of the premises was surrendered to the contractor. It was further said that the whole project involved many interdependent details, the control of any one of which could not be surrendered without disorganization of the whole, and that, from the nature of the work, its performance could not be committed exclusively by the railroad to the contractor engaged in doing the unloading and reloading work and rendering the other services in question. The railroad had this right of control in the instant case to the same extent as it did in the *Roth* case. . . ."

Direct evidence of control, a subordinate item of the control test, consists of the elements of payment by time; payment on a piecework or commission basis; and payment by completed project. It will be noticed that this item of control deals with the method of payment.

In *Henry v. Industrial Commission*,[28] one Henry, a carpenter contractor, was to furnish carpenters for the service company when they wanted them in order to remodel its elevators. He was paid two dollars per hour for each man furnished and he in turn gave them $1.90 per hour. The superintendent of the company told Henry how many carpenters to bring each day and told him what to do. He in turn relayed the orders to his men or his foreman who related them to claimant, one of the carpenters Henry took on the job. At the time Henry had two other jobs going. The court held that Henry was an employee of the company, and hence, so was the claimant. The basis for this decision was the method of payment, which was by time. A Virginia court in the

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[24]Maryland Casualty Co. v. Real, 244 S. W. 2d 865 (Tex. Civ. App. 1952).
[25]Nixon v. Webber-Riley Lumber Co., 71 Idaho 238, 229 P. 2d 997 (1951).
[26]Pennsylvania Ry. v. Roth, 163 F. 2d 161 (6th Cir. 1947).
[27]172 F. 2d 710 (6th Cir. 1949).
[28]412 Ill. 279, 106 N. E. 2d 185 (1952).

case of *Phillips v. Brinkly*[29] held a trucker to be an employee because he was paid at the rate of two dollars an hour, although this included the truck owned by the employee. In the case of *Neely-Towner Motor Co. v. Industrial Commission*,[30] the claimant was paid on an hourly basis and furnished with materials for construction of an office building for operator of a used car lot. The court held him to be an employee. Payment by time in the case of *Schneider v. Village of Shickley*,[31] was a significant factor in determining the worker to be an employee. The court stated that the hourly pay indicated that the worker was an employee.

Although payment by time is direct evidence of control, it will not be decisive when weighed against other factors.[32] The following cases support this proposition: *Phaneuf v. Industrial Commission;*[33] *Bourgeois v. Cacciapuoti;*[34] *Burkhardt v. State;*[35] *Carlson v. Costello.*[36] The doctrine of these cases is summed up by the Oregon court in the case of *Harris v. State Industrial Accident Commission*,[37] when it said:

> "The payment of wages is considered the least conclusive of the tests for determining whether the relation of employer and employee exists. It is not decisive where it is shown that the employee was actually under the control of another person during the progress of the work."

Payment on a piecework or commission basis as an element of direct evidence of control is given more weight by the courts than is the element of payment by time. The following recent cases have held the employment status to be that of employee on the basis of this element: *Sones v. Southern Lumber Co.;*[38] *Maryland Casulty Co. v. Real;* [39] *C. E. Adams and Co. v. Harrell;*[40] *Fitzen v. Cream Top Dairy;*[41] *Graf v. Montgomery Ward and Co.;*[42] *Fitzpatrick v. Haberman;*[43] and *Monnerjahn v. Times Picayune Publishing Co.*[44] The reason that this element seems to be more conclusive than payment by time is that in those cases where payment by time was the direct evidence of control and independent contractor relationship was found, the stronger factors involved in the factual situation outweighed this element. If the fact situations involving payment on a piecework or commission basis were to be intertwined with fact situations involving stronger factors and evidencing lack of control, the result in some of the cases noted above would, no doubt, have been different.

29194 Va. 62, 72 S. E. 2d 339 (1952).
30123 Colo. 472, 230 P. 2d 993 (1951).
31156 Neb. 783, 57 N. W. 2d 527 (1953).
32Phaneuf v. Industrial Commission, 263 Wis. 376, 57 N. W. 2d 406 (1953). Worker was to be paid an hourly rate, but the method of payment was not even considered in the decision.
33263 Wis. 376, 57 N. W. 2d 406 (1953).
34138 Conn. 317, 83 A. 2d 122 (1951).
3578 N. D. 818, 53 N. W. 2d 394 (1952).
3674 S. D. 36, 48 N. W. 2d 825 (1951).
37191 Ore. 254, 230 P. 2d 175 (1951).
38215 Miss. 149, 60 So. 2d 582 (1952).
39244 S. W. 2d 865 (Tex. Civ. App. 1952).
40257 Ala. 25, 57 So. 2d 83 (1952).
4173 Idaho 210, 249 P. 2d 806 (1952).
42234 Minn. 485, 49 N. W. 2d 797 (1951).
4316 N. J. Super. Ct. 490, 85 A. 2d 7 (1951).
4467 So. 2d 756 (La. App. 1953).

Payment by completed project usually relates to the ultimate result of the work and thus results in an independent contractor relationship. The court found an independent contractor relationship in the case of *Fahey v. Terp*,[45] where the worker installed a new roof for $50, with the owner to furnish materials. *Butts v. State Industrial Accident Commission*[46] is in accord with this view, wherein a contract to move fixed quantity of logs from landing to mill at $4 per thousand is a contract for end result, not for "performance of labor," and results in independent contractorship.

In determining the employer-employee relationship, the element of who furnishes the equipment or materials is important. As a general rule, if the materials or equipment necessary to do a particular job are furnished by the employer, the one contracting to do the job is an employee.[47] In the case of *Neely-Towner Motor Co. v. Industrial Commission*,[48] materials for a building were furnished by the owner. Held, the one doing the work was an employee. In *Schneider v. Village of Shickley*,[49] an electrician of a city which furnished all supplies was an employee although he used his own tools. The Mississippi Supreme Court held, in *Sones v. Southern Lumber Co.*,[50] that where a mill owner furnished all the equipment for a logging operation, the one doing the logging was an employee.

When the equipment is furnished by the worker, it is generally held that his employment status is that of an independent contractor.[51] In *Carr v. Crabtree*,[52] trucks and tools were furnished by the worker. The Supreme Court of Mississippi held that the worker was an independent contractor. In *Rose v. Black and White Cab Co.*,[53] the cab company did not own the cabs, but did aid the drivers in buying them by financing the purchases. The company paid the drivers nothing; instead the drivers paid the company $4.50 for a twelve hour shift. For this the drivers received calls over radios installed in the cars by the company. The company also paid the liability and collision insurance, and furnished a garage at which the drivers could buy gas and oil and have repairs done. The company's name was painted on each car. One Rose did not own the car in the instant case; he was serving as an extra driver for one Robinson who owned the cab. However, Rose paid the company the daily price for its services and for financing the car. The court found that an independent contractor relationship existed.

It has been shown that the general rule is that where the equipment is furnished by the worker, an independent contractor relation-

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45235 Minn. 432, 51 N. W. 2d 273 (1952).

46193 Ore. 417, 239 P. 2d 238 (1952).

47Neely-Towner Motor Co. v. Industrial Commission, 123 Colo. 472, 230 P. 2d 993 (1951); Schneider v. Village of Shickley, 156 Neb. 683, 57 N. W. 2d 527 (1953); Sones v. Southern Lumber Co., 215 Miss. 149, 60 So. 2d 582 (1952). *Contra*, Alexander-Bland Lumber Co. v. Jenkins, 87 Ga. App. 678, 75 S. E. 2d 355 (1953). Lumber company furnished the saw mill, but the operator of it was held to be an independent contractor because the company did not control details.

48123 Colo. 472, 230 P. 2d 993 (1951).

49156 Neb. 683, 57 N. W. 2d 527 (1953).

50215 Miss. 149, 60 So. 2d 582 (1952).

51Carr v. Crabtree, 212 Miss. 656, 55 So. 2d 408 (1951); Rose v. Black and White Cab Co., 258 S. W. 2d 50 (Ark. 1953); Johnson v. Haskell Lemon Construction Co., 262 P. 2d 142 (Okla. 1953).

52212 Miss. 656, 55 So. 2d 408 (1951).

53258 S. W. 2d 50 (Ark. 1953).

ship exists. However, when this factor is weighed against other factors of control, the result is that an employee relationship exists.[54] Claimant, a cab driver, who owned his automobile which he left on the cab company lot as required, worked regular hours, received information from company as to whom to pick up, and was required to buy all his oil and gas from the company, was an employee of the cab company as decided in the case of *Jackson v. State Industrial Commission*.[55] In *Henry v. Industrial Commission*,[56] the court held as an employee one who furnished carpenter's tools and ladders to do a particular job. When a truck-owner, even with a helper, is hired to do extra hauling, which is not a definite part of any particular job, and is told where to go and what to do, he is an employee although paid on a piecework basis.[57]

In the following factual situation, a truck-owner-driver had been employed for about two and one half years. Though such drivers could buy sand and deliver to whomever they pleased, the court found that the company used 90% of the sand and such other sales were only made when there was a lull in the company's operation. It was held in *Maryland Casulty Co. v. Real*[58] that such truck-owner-driver was an employee. This view is affirmed in *Jackson Trucking Co., Inc. v. Interstate Motor Freight System*.[59] A truck driver in this case owned a truck under a conditional sales contract from the trucking company and leased it back to the company to haul cargo provided by the company on routes and to destinations assigned by the company. The driver paid his traveling expenses and fuel and maintenance costs for the truck and was paid on the basis of freight hauled and mileage traveled. Either party could terminate the relationship. The court held that the truck driver was an employee.

Where the contractor furnishes equipment and the owner also furnishes equipment, all to be utilized on the same job, the test of who furnishes the equipment is inconclusive and the courts will determine the employment status on the basis of other factors.[60] Thus, in the case of *Fahey v. Terp*,[61] where the contractor furnished hammer, roofing knife and snips, and the owner furnished paper, asphalt, mops, barrels and ladders, the equipment test was inconclusive; claimant was an independent contractor on basis of payment-by-the-job test.

It is said that the right to fire for disobedience, misconduct or other

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[54]Jackson v. State Industrial Commission, 207 Okla. 28, 246 P. 2d 742 (1952); Henry v. Industrial Commission, 412 Ill. 279, 106 N. E. 2d 185 (1952); Nixon v. Webber-Riley Lumber Co., 71 Idaho 238, 229 P 2d 997 (1951); Maryland Casualty Co. v. Real, 244 S. W. 2d 865 (Tex. Civ. App. 1952); Phillips v. Brinkley, 194 Va. 62, 72 S. E. 2d 339 (1952). Driver-owner of truck held employee; Bourgeois v. Cacciapuoti, 138 Conn. 317, 84 A. 2d 122 (1951). Fact that installer of electrical and plumbing fixtures furnished his own equipment was not decisive; Porter v. Barton, 98 N. H. 104, 95 A. 2d 118 (1953). Woodchopper held to be an employee, though he furnished his own ax; Schneider v. Village of Shickley, 156 Neb. 683, 57 N. W. 2d 527 (1952); Fitzpatrick v. Haberman, 16 N. J. Super. Ct. 490, 85 A. 2d 7 (1951); Hansen v. Adent, 238 Minn. 540, 57 N. W. 2d 681 (1953); Jackson Trucking Co. v. Interstate Motor Freight System, 122 Ind. App. 546, 104 N. E. 2d 575 (1952).

[55]207 Okla. 28, 246 P. 2d 742 (1952).

[56]412 Ill. 279, 106 N. E. 2d 185 (1952).

[57]Nixon v. Webber-Riley Lumber Co., 71 Idaho 238, 229 P. 2d 997 (1951).

[58]244 S. W. 2d 865 (Tex. Civ. App. 1952).

[59]122 Ind. App. 546, 104 N. E. 2d 575 (1952).

[60]Fahey v. Terp, 235 Minn. 432, 51 N. W. 2d 273 (1952).

[61]See note 60 *supra*.

reasons is an important factor to be considered in the determination of the question under discussion. If the employer possesses this power of control over the worker, it is a strong circumstance tending to show the subserviency of such worker, since it is incompatible with the full control of the work usually enjoyed by an independent contractor.[62] This power of control is not conclusive, however, when practically all other factors show independent contractorship;[63] but, if the other tests point toward an employee relationship, the courts will buttress their holdings by citing the employer's right to fire at any time.[64] The power to discharge was the conclusive test in three recent decisions. In the first of these, *St. Paul-Mercury Indemnity Co. v. Alexander Co.*, [65] a construction company retained the right to fire drivers hired by an owner of trucks who contracted with the company for hauling. It was held that such drivers were employees of the construction company. In *Fanning v. Apawana Golf Club*,[66] the court held a caddy to be an employee. The club had the right to remove and discharge the caddy, right to select caddies and the right to direct both what work should be done and the method of doing it. This was enforceable, according to the court, because of the club's power to eject or exclude caddies from the premises. This case is not as strong as the former one in support of the proposition that the power to discharge is a conclusive test, since in this case this power was intertwined with other tests pointing toward an employee-employer relationship. In the case of *Phillips v. Brinkley*,[67] the court held that the right to terminate employment at any time indicated an employment relationship where a trucker furnished his own truck and had no fixed quantity of work to perform.

Relative Nature of Work Test Evaluated

The control test as a factor in the determination of the question under discussion is the only factor that has become a rule of law. However, where this older test fails to protect the worker, the recent decisions indicate the shifting of emphasis from the established doctrine to one more adapted to social and economic needs. The case of *Gordon v. New York Life Insurance Co.*[68] is authority for this proposition. By written contract the salesman was free to exercise her own discretion and judgment with respect to the time, place and manner of solicitations; her payment was by commission, not by time; she paid her own expenses and used her own car; she was not required to make any report of her activities or to attend meetings; she had no office space; the company, after her initial training period, did not in fact exercise any control over her work, beyond limiting her to certain territory and forbidding her to sell competing insurance; and, for good measure, the written contract said explicitly that she should not be an employee but an independent contractor. Although there was no control present, the court held that she was an employee. Ordinarily, under the established doctrine, this would be a strong case for independent contractorship, and thus represents a sharp departure from the old theory. With-

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62Hall v. Salvation Army, 261 N. Y. 110, 184 N. E. 691 (1933).
63Carlson v. Costello, 74 S. D. 36, 48 N. W. 2d 825 (1951).
64Sones v. Southern Lumber Co., 215 Miss. 656, 55 So. 2d 408 (1951).
6584 Ga. App. 207, 65 S. E. 2d 694 (1951).
66169 Pa. Super. Ct. 180, 82 A. 2d 584 (1951).
67194 Va. 62, 72 S. E. 2d 339 (1952).
68300 N. Y. 652, 90 N. E. 2d 898 (1950), *reversing* 89 N. Y. S. 2d 83 (1949).

out saying so in that many words, the court was obviously invoking the relative-nature-of-the-work test to protect a worker, who under established rules would have been an independent contractor and not entitled to protection. As to this trend the Wisconsin court in the case of *Mace v. Morrison and Fleming*[69] had this to say:

> "Notwithstanding the fact that the doctrine of independent contractor relaitonship is being gradually obliterated in this state by judicial erosion, on the record the conclusion is inescapable that Mace was an independent contractor and not an employee."

Wisconsin, always a pioneer in the field of workmen's compensation, has come up with the solution which should be followed in the other states. The statute provides:

> "Every independent contractor who does not maintain a separate business and who does not hold himself out to and render service to the public, provided he is not himself an employer subject to this chapter or has not complied with the conditions of subsection (2) of section 102.28 (requiring insurance or the equivalent), shall for the purpose of this chapter be an employee of any employer under this chapter for whom he is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury."[70]

Larson, in his treatise on the Workmen's Compensation Law,[71] suggests grouping the common law factors of (1) whether the work is an integral part of the employer's business and (2) whether the worker furnished an independent business or professional service under the relative-nature-of-the-work test. However, this suggested test has not become a rule of law, and it will take many years for a process of judicial erosion to establish it as such. The unprotected worker should not be required to wait this long. If and when the relative-nature-of-the-work test does become a rule of law, it will still be an extension of the old common law tests, and will thus not be able to supply the aid to accomplish the desired result. So long as the courts apply the ordinary common law tests in the light of respondent superior cases, which tests are not appropriate under workmen's compensation law, the true purpose of compensation statutes cannot be realized.

The determination of the status of an injured workman, as an employee within the meaning of workmen's compensation statutes or as an independent contractor not within the operation thereof, should not be controlled by common law decisions and tests but by more liberal principles. The case of *In re Rheinwald*[72] is good authority for this proposition; however, the court's decision awarding compensation in the *Rheinwald* case was reversed on a subsequent appeal.[73]

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[69]267 App. Div. 29, 44 N. Y. S. 2d 672, *aff'd*, 293 N. Y. 844, 59 N. E. 2d 438 (1943).
[70]WIS. STAT. § 102.07 (8).
[71]LARSON, WORKMEN'S COMPENSATION LAW § 43.53 (1954).
[72]168 App. Div. 425, 153 N. Y. Supp. 598 (1915).
[73]Rheinwald v. Builders' Brick and Supply Co., 174 App. Div. 935, 160 N. Y. Supp. 1143 (1916), *aff'd*, 223 N. Y. 572, 119 N. E. 1074 (1918).

Conclusion

Each controversy involving the status of an independent contractor must be decided on its peculiar facts and ordinarily no one feature of the relationship is determinative.[74] While the common law doctrine of the employer-employee relationship is a guide in interpreting the compensation statutes,[75] the trend of the decisions is to deny such interpretation where it fails to protect the worker.[76]

Although a more liberal trend is being established, the fact remains that contracts, otherwise valid, that are entered into for the purpose of creating the relationship of independent contractor rather than master and servant, are effective, although the only purpose of the contract is to avoid liability under the workmen's compensation statutes. Legislative action is needed, such as was provided by the Wisconsin Legislature to protect independent contractors. Unless the Wisconsin example is followed by the other states, the true intention of the workmen's compensation statutes cannot be fulfilled and many laborers will continue to be unprotected by the compensation statutes through the use of these subterfuges by unscrupulous entrepreneurs.

Marion D. Roten

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[74]Pennsylvania Ry. v. Barlion, 172 F. 2d 710 (6th Cir. 1949).
[75]Manning v. Whalen, 259 App. Div. 490, 20 N. Y. S. 2d 364 (1940).
[76]See note 68 *supra*.

RECENT DECISIONS

Workmen's Compensation—Liability of Successive Employers

The subject cases involve injuries to claimants who suffered two or more separate accidental injuries while employed by successive employers. The injuries resulted in temporary partial disabilities, with ultimate disability caused in part by one or more of the earlier accidents. Held: The award for the latest and present employers when there is some causal connection between the injuries. *Meszaros v. Goldman; Braunstein v. General Marine Repair,* — N. Y. —, 121 N. E. 2d 232 (1954).

Again the New York courts follow the 1931 case of *Anderson v. Babcock,*[1] the leading case in that jurisdiction, allowing an apportionment of the amount claimed under the Workmen's Compensation Act between successive employer-carriers, provided however, there is a causal connection between the first injury and the successive injuries.

There is considerable variance among the courts as to the rule to be followed. Due to the fact that the courts are not consistent in their findings in respect to injuries and occupational diseases (under these particular factual situations), it is necessary to discuss injuries and occupational diseases separately.

Taking first occupational diseases, the courts of New York hold that the date of disablement is controlling, and therefore find the present carrier liable even though the occupational disease could be found to have been contracted during the period when other carriers had the risk.[2] This court and those courts which are in accord are following the general rule that, in the case of occupational diseases, the carrier presently insuring the risk shall be liable for the disablement.

A similar line of reasoning concludes that the employer who last exposed the employee to the particular element which could possibly cause the disease shall be liable.[3] It is apparent that this rule in its application could hold liable either the present employer, or such other previous employers who may have exposed the claimant to the particular condition which caused the disease.

The courts are more lenient in allowing a proration between successive employers or carriers in the case of occupational diseases, primarily because many occupational diseases are cumulative in their effect. Further, it appears more equitable to hold all employers liable whose employments have contributed to the infirmity.

As to injuries, the rule in Indiana,[4] Massachusetts,[5] and Michigan,[6] seems to be that the carrier which insures the risk at the time of the most recent injury bearing a causal relation to the disability is liable.

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[1]256 N. Y. 146, 175 N. E. 654 (1931).

[2]Russo v. Despatch Shops, Inc., 280 App. Div. 1008, 1030, 116 N. Y. S. 2d 788 (1952). The Courts of Massachusetts followed the same theory in Tassone's Case, 330 Mass. 545, 116 N. E. 2d 126 (1953) and Sylvia's Case, 313 Mass. 313, 47 N. E. 2d 293 (1943).

[3]Pacific Employers' Ins. Co. v. Industrial Commission of Utah, 108 Utah 123, 157 P. 2d 800 (1945). Trimboli v. Ford Instrument Co. Inc., 271 App. Div. 854, 66 N. Y. S. 2d 39 (1946). Stewart v. Duncan, 239 N. C. 640, 80 S. E. 2d 764 (1954). Bye v. Interstate Granite Co., 230 N. C. 334, 53 S. E. 2d 274 (1949). Greco v. Travelers Ins. Co., 283 App. Div. 762, 128 N. Y. S. 2d 219 (1954). Amended, 283 App. Div. 829, 129 N. Y. S. 2d 505 (1954).

[4]Aetna Casualty and Surety Co. v. Hightower, 107 Ind. App. 46, 22 N. E. 2d 875 (1939).

[5]Evans' Case, 299 Mass. 435, 13 N. E. 2d 27 (1938). Falcione's Case, 305 Mass. 433, 26 N. E. 2d 308 (1940). Morin's Case, 321 Mass. 310, 73 N. E. 2d 467 (1947). Fitzpatrick's Case, — Mass. —, 118 N. E. 2d 775 (1954).

[6]Brinkert v. Kalamazoo Vegetable Parchment Co., 297 Mich. 611, 298 N. W. 301 (1941).

As indicated by the subject cases, the rule in New York is that there shall be an apportionment between all previous employer-carriers, provided there is a causal connection between the successive injuries. New York is followed by Arkansas,[7] Connecticut,[8] and Louisiana[9] in the application of this rule.

In Mississippi, the question as to the liability of successive employers has never arisen. However, the Courts of this state will likely follow that rule which holds the present employer-carrier liable under the theory: "The insurer takes the employee in the condition in which it finds him,"[10] and any resulting injury to the employee shall be the liability of the carrier presently assuming the risk.

Robert A. Pritchard

WILLS—AGREEMENTS TO LEAVE PROPERTY FOR SERVICES RENDERED

Proceedings on petition contesting the validity of a codicil to a will. Testator, an elderly widow, purchased and conveyed by warranty deed a home to plaintiff in return for agreement to care for her, but not to pay for her personal expenses. Shortly thereafter, a written contract was signed by both parties in which all the terms of the agreement were included. At the same time, a will was executed in which plaintiff was left the balance of testator's estate after death of testator's daughter. By subsequent codicil, and unknown to plaintiff, testator changed the beneficiary from plaintiff to "The Methodist Church." Complainant fully performed services. It was alleged that testator had entered into verbal agreement to leave property as part of the consideration for caring for her, and that the codicil attempting to change such bequest was therefore not effective under the decision announced in *Johnston v. Tomme*,[1] and was also void for uncertainty in designation of legatee. HELD: The will was not made pursuant to a contract to make a will; was not irrevocable; and the codicil was specific enough to be effective. *Fuqua v. Mills*, 73 So. 2d 113 (Miss., 1945).

As there was only one Methodist Church in the community in which the codicil was signed, and complainants admitted the existence of such by making the trustees thereof defendants, the court found sufficient reason for admitting parol evidence to prove the certainty of the beneficiary.[2]

The question of oral agreements to make bequests for services rendered has presented some interesting issues in Mississippi.[3] There has been some speculation as to

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[7]Employers' Casualty Co. v. United States Fidelity & Guaranty Co., — Ark. —, 214 S. W. 2d 774 (1948).

[8]Mund v. Farmers' Cooperative, 138 Conn. 338, 94 A. 2d 19 (1952).

[9]Stansbury v. National Auto & Cas. Ins. Co. of Los Angeles, Cal. and Stansbury v. Ocean Accident & Guaranty Corp., — La. —, 52 So. 2d 300 (1951).

[10]Evans' Case, *supra* note 5.

[1]199 Miss. 337, 24 So. 2d 730 (1946).

[2]THOMPSON, WILLS § 262 (3d ed. 1947): "A bequest will never be rendered void by an uncertain description of the beneficiary, if the name and description used in the will as applied to the facts and circumstances proved will identify such persons from all other persons." Snider v. Snider, 70 S. C. 555, 50 S.E. 504, 106 Am. St. Rep. 754 (1905); Tearwater v. Baptist Orphan's Home, 173 Tenn. 409, 119 S. W. 2d 919 (1938).

[3]The court is faced with the question of upholding such agreements when the results would be equitable, and maintaining a strict construction of the Statute of Frauds, under which oral contracts to devise are void, part performances not taking such contracts out of the Statute of Frauds. Wells v. Brooks, 199 Miss. 327, 24 So. 2d 533 (1946); Stephens v. Duckworth, 188 Miss. 626, 110 So. 211 (1926); Gulfport C. O., F. G. Co. v. Renau, 94 Miss. 904, 48 So. 292 (1909); Milan v. Paxton, 160 Miss. 562, 132 So. 171 (1931).

whether the relief granted in *Johnston v. Tomme*[4] was based on contract, will, or constructive trust. It has been suggested that the decision indicates an increasing liberality on the part of the Mississippi Supreme Court in the heretofore stringent construction of the Statute of Frauds.[5] A comparison of the *Tomme* case with the instant case presents what apparently is a strikingly similar set of circumstances, and it might seem difficult to reconcile the two decisions. In both cases, there were agreements to convey for services rendered with the subsequent performance of the services; and bequests by testator to the party rendering the services were changed without beneficiary's knowledge. The *Fuqua* case involved an additional contract in which the services were mentioned. Seemingly, the court is preferring an oral contract in the *Fuqua case,* over a written contract in the *Tomme* case. However, a closer examination does not bear out such a conclusion.

The *Tomme* case applied the rule that oral agreements of this nature do not violate the Statute of Frauds once there has been performance, the executory contract having become executed.[6] However, where the oral agreements have been reduced to writing, it is presumed that all the terms orally agreed to have been integrated into the writing and parol evidence can not generally be introduced to show terms contra to those expressed.[7] In the *Fuqua* case, it was never asserted that there were any services rendered testator other than those listed in the contract as consideration for the conveyance of the house; nor did the will contain any reference to consideration for the bequest. While there may have been an agreement to make a residuary bequest to plaintiff, unless a contract, i.e., a promise to do so, for appropriate consideration, is proved, such bequest is revocable.[8] Such a contract must be proved by clear, substantial and satisfactory testimony or other proof.[9] It was the contention of plaintiff that the entire agreement was incorporated in the contract, will, and deed and that when all three were considered together, their separate provisions became binding as one promise.[10] It is an established rule of contracts that "a binding agreement may be collected from various different writings if there is no conflict between the writings in respect of terms, parties, and like."[11] There is no such situation in the instant case. The "binding agreement" is contained in a written contract in which all parties had expressly agreed to all matters.[12] Such contracts are to be distinguished from a will containing the same provisions; the basis of the rights of the parties to the contract is found in the terms of the contract itself and not in the

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[4]199 Miss. 337, 24 So. 2d 730 (1946).

[5]18 Miss. L. J. 328 (1947).

[6]Johnston v. Tomme, 199 Miss. 337, 24 So. 2d 730 (1946). The court held that the agreement was not an oral contract to convey land, but was simply an agreement to make a will, stating: "An oral agreement, when performed by execution of a will, is thereby executed . . . the oral agreement was therefore completely executed on Johnston's part through the written will, and by Mrs. Tomme by her performance of her agreement. . . ."

[7]RESTATEMENT, CONTRACTS § 228 (1932); Pettet v. Cooper, 62 Ohio App. 377, 24 N. E. 2d 299 (1930); Dowling v. Smyley, 150 Miss. 272, 116 So. 294 (1928). In the latter case, the court stated: "Generally, all previous undertakings and agreements are merged in the contract when written. . . ."

[8]Anderson v. Anderson, 75 Kan. 117, 88 Pac. 743, 9 L.R.A. (N.S.) 229 (1907). See also cases cited, Bartlett, *Agreements to Leave or Will Property in Kansas,* 7 KAN. L. REV. 75 (1939).

[9]Anderson v. Anderson, *supra* note 8. It was stated that courts would hesitate to assume the grave responsibility of implying an agreement, the existence of which depends upon circumstances inconclusive in their nature and permitting an inference either way.

[10]Fuqua v. Mills, 73 So. 2d 113, 121 (Miss. 1954).

[11]17 C. J. S., *Contracts,* § 58.

[12]Fuqua v. Mills, 73 So. 2d 113, 121 (Miss. 1954). Where the contract is copied: ". . . and the parties hereto having agreed to all matters."

will.[13] Clearly then, the contract in the *Fuqua* case represents the *only* binding agreement between the parties which was separate and distinct from the bequest in the will. It is thus submitted that, as there was no consideration proved for the bequest, testator may have at any time revoked without injury or inequity to plaintiff.

One of the burdens resting on plaintiffs in suits of this nature has to do with the adequacy of remedy at law, and chiefly it must be shown that the services performed must have been of such peculiar nature, that the value thereof is not subject to pecuniary estimate.[14] This is the second distinction between the *Fuqua* case and the *Tomme* case. Testator required no such peculiar non-compensable services in the *Fuqua* case.[15] Plaintiff was to supply deceased with "table board" and lodging only for which she was adequately compensated. Apart from the question of whether or not there was a promise of bequest, the nature of relief sought in the instant case—either by way of specific performance or holding that the will was irrevocable—was not commensurate with any services rendered.

It is an interesting question as to whether the court intended to limit the liberal decision rendered in *Tomme* to oral contracts involving unique services by the *Fuqua* case or not. In an earlier decision, the court expressly reaffirmed the *Tomme* case as being "sound and equitable."[16] Facts in that case place it squarely in line with *Tomme*. Thus, despite the fact that *Tomme* has been characterized as an unique decision,[17] the liberal rule therein declared seems well established and nothing said in the instant case would indicate a change in the attitude of the Mississippi Supreme Court on this question.

Ervin McKay

AGENCY—LIABILITY OF OWNERS OF MOTOR VEHICLES TO THIRD PARTIES

The plaintiff brought suit against both the owner and the driver of a truck for personal injuries allegedly sustained when the automobile in which she was a passenger was struck by the truck. The complainant did not allege any separate negligence on the part of the owner. Under instructions that the jury could return a verdict against either defendant, or both of them, the jury returned a verdict against the owner only, making no finding as to the driver. The owner appealed, contending liability was based solely on the doctrine of respondeat superior, and that the failure to return a verdict against the driver necessarily exonerated the owner whose liability was derivative only. HELD: Since plaintiff could have sued either defendant alone, a judgment could be returned against either alone. In a separate opinion, Roberds, Presiding Justice, expressed the opinion that the conclusion that the master may be liable for negligence of the servant even though the servant is not negligent violates all logic, reason and common sense. *Gulf Refining Co. v. Myrick,* 71 So. 2d 217 (Miss. 1954).

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[13]Johnston v. Tomme, 199 Miss. 337, 24 So. 2d 730 (1946); Denson v. Denson, 203 Miss. 146, 33 So. 2d 311 (1948); 69 A. L. R. 1, 208 where the general rule is stated: "A contract is not proved by the execution of a will in favor of the promisee, in the absence of evidence that the latter ever saw it or knew of its execution, or that the parties had ever agreed on its terms, or assumed the obligations therein written, for the reason that the will is ambulatory; its provisions are subject to change at the mere pleasure of the testator, unless by contract he has obligated himself otherwise. . . ."

[14]Bartlett, *Agreements to Leave or Will Property in Kansas,* 7 KAN. L. REV. 75 (1939).

[15]She was never an invalid and ". . . was able to walk and was up and around the house all the time until about two weeks before her death. . . ." Fuqua v. Mills, 73 So. 2d 113, 116 (Miss. 1954).

[16]Denson v. Denson, 203 Miss. 146, 33 So. 2d 311 (1948).

[17]18MISS. L. J. 328 (1947).

By the great weight of authority, if the master's liability depends solely on the doctrine of respondeat superior, a verdict acquitting the servant when master and servant are sued jointly necessarily precludes a recovery against the master.[1] This rule has been specifically applied to the liability of owners of motor vehicles in at least sixteen states.[2] In the brief of the appellant, Gulf Refining Company, counsel[3] cited many of the cases most critical of the reasoning upon which the lower court's decision was based. In affirming the judgment of the trial court, the Supreme Court quoted extensively from the opinion in the leading case of *Illinois Central Railroad Co. v. Clark,*[4] and cited *St. Louis & San Francisco Railroad Co. v. Sanderson*[5] and *Thomas v. Rounds*[6] as settling the law in Mississippi on this point.

However, a portion of the opinion in *Illinois Central Railroad Co. v. Clark,*[7] not referred to in the instant case, in discussing the liabilities of the railroad company and its engineer, indicates recognition of a separate ground of recovery against the railroad.[8] The *Clark* case[9] also relied heavily on *Gulf, C. & S. F. Railway Co. v. James,*[10] which was an action for malicious prosecution against the railway company and its agents jointly. Appeal was from a verdict against the railway company only. The court admitted the verdict was not '.altogether consistent," but distinguished between the liability for intentional and negligent torts.[11]

The decision in *St. Louis & San Francisco Railroad Co. v. Sanderson*[12] also seems to recognize the distinction between purely vicarious liability and an additional liability imposed due to the nature of the employer's business.[13]

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[1]57 C.J.S. Master & Servant § 619; 39 C.J. Master & Servant § 1602; see Note, 78 A.L.R. 365 (1931).

[2]Alabama—Sibley v. Odum, 58 So. 2d 896 (Ala. 1951). Arkansas—Porter-DeWitt Const. Co. v. Danley, 256 S.W. 2d 540 (Ark. 1953). California—Daniel v. Jones, 150 Cal. App. 145, 35 P.2d 198 (1934). Georgia—Kalil v. Spivey, 70 Ga. App. 84, 27 S.E. 2d 475 (1943). Illinois—J. F. Martin Cartage Co. v. Demster Bros., Inc., 311 Ill. App. 70, 35 N.E. 2d 391 (1941). Indiana—Holbrook v. Nolan, 105 Ind. App. 75, 10 N.E. 2d 744 (1937). Iowa—Burgess v. Magarian, 214 Iowa 694, 243 N.W. 356 (1932). Kentucky—Dillion v. Harkleread, 295 Ky. 308, 174 S.W. 2d 419 (1943). Missouri—Ruehling v. Pickwich-Greyhound Lines, Inc., 337 Mo. 196, 85 S.W. 2d 602 (1935). New Jersey—Vaniewsky v. Demarest Bros. Co., 106 N.J.L. 34, 148 A. 17 (1929). New York—Pangburn v. Buick Motor Co., 211 N.Y. 228, 105 N.E. 423 (1914). Oklahoma—Anthony v. Covington, 187 Okla. 27, 100 P. 2d 461 (1940). Pennsylvania—East Broad Top Transit Co. v. Flood, 326 Pa. 353, 192 A. 401 (1937) (dictum). South Carolina—Greer v. State Highway Dept., 160 S.C. 510, 159 S.E. 35 (1931). Tennessee—Summers v. Bond-Chadwell Co., 24 Tenn. App. 357, 145 S.W. 2d 7 (1939). Virginia—Lough v. Price, 161 Va. 811, 172 S.E. 269 (1934).

[3]Welch, Gibbes and Butts, Laurel, Mississippi; Harvey L. Strayhan, Wm. R. Harris, Jackson, Mississippi; Archie D. Gray, Irwin W. Coleman, Pittsburgh, Pennsylvania. Counsel.

[4]85 Miss. 691, 38 So. 97 (1905).

[5]99 Miss. 148, 54 So. 885 (1910); L. R. A. (N. S.) 352 see Note, 46 L. R. A. (N.S) 352 (1911)

[6]161 Miss. 713, 137 So. 894 (1931).

[7]*Supra,* note 4.

[8]". . . Though equally liable, their liability was based on distinct and different legal principles—the engineer, because of his personal trespass; the railroad company, because of its failure to discharge its nondelegatable duty to the public regarding the custody and management of its dangerous instrumentalities. . . ." Illinois Central Railroad Co. v. Clark, *supra,* note 4, 38 So. at 98.

[9]Illinois Central Railroad Co. v. Clark, *supra,* note 4.

[10]73 Tex. 12, 10 S.W. 744 (1889).

[11]". . . In actions growing out of that class of torts characterized by the existence of a wrongful intent, as distinguished from torts arising from negligence, the rule is recognized as just which compels each of the wrongdoers, when such, to bear and assume the responsibility of all. . . ." Gulf, C.&S.F. Railway Co. v. James, *supra,* note 10 S. W at 746

[12]*Supra* note 5.

[13]". . . In Thompson on Negligence, vol. 3, § 3187, it is said: 'This calls up a

Aside from accepting the decision in the instant case as a minority view of the employer's liability under the doctrine of respondeat superior, there seem to be three possible theories upon which it may be supported: (a) That master and servant are joint tort-feasors. This was the assumption in *Thomas v. Rounds*,[14] but does not appear to be a tenable position since the decision in *Granquist v. Crystal Springs Lumber Co.*[15] (b) That a failure to find a verdict against the servant, as distinguished from a finding in favor of the servant, does not amount to a finding that the servant was not negligent. This is substantially the position taken by New Jersey.[16] (c) That injury to an innocent third person[17] resulting from the operation of a motor vehicle in the course of the owner's business is in itself a breach of duty and provides a separate basis for recovery against the owner.

It is submitted that the third theory is consistent with the decisions in the *Clark* and *Sanderson* cases. Since the true basis of the employer's liability is generally conceded to be social policy,[18] and potential danger to others is recognized as incident to the operation of motor vehicles,[19] the imposition of a stricter liability than negligence alone upon those whose servants utilize the public highways in furtherance of the master's business may well be considered sound social engineering.

Nathaniel W. Bullard

FEDERAL PROCEDURE—WAIVER OF VENUE UNDER NON-RESIDENT MOTORIST STATUTE

The defendant, a resident of Indiana, while driving in Kentucky, collided with the plaintiff's overpass. The plaintiff, a railroad incorporated under the laws of Illinois, brought this action in the Federal District Court of Kentucky for the damage to its property. The basis for jurisdiction was diversity of ctizenship. The defendant was served with process according to the Kentucky Non-resident Motorist Statute;[1] he specially appeared and moved that the case be dismissed on the ground of improper venue. The motion was overruled and verdict was given for the plaintiff. The Court of Appeals affirmed the judgment[2] and the Supreme Court granted certiorari. HELD:

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plain distinction between the liability of a carrier of passengers for assaults or insults committed by his own servants upon his passengers and for similar wrongs committed by them upon trespassers or third persons. For such wrongs committed upon his passengers he will be liable in any event, whether in doing them his servant was acting within the scope of his employment or not, since they are a breach of his contract to carry his passengers in safety and with good treatment.'

"And in a masterly opinion by McClellan, Ch. J., Birmingham Railway and Electric Co. v. Baird, reported in 130 Ala. 334, 30 So. 456, 89 Am. St. Rep. 43, 54 L.R.A. 752, this doctrine is elaborately discussed and thoroughly vindicated. . . . Judge McClellan, speaking for the supreme court of Alabama in that case says: '. . . The carrier is liable in such cases because the act is violative of the duty it owes through the servant to the passenger, and not upon the idea that the act is incidental to a duty within the scope of the servant's employment. . . .'

"We approve this as the true rule in this character of cases. . . ."

St. Louis & San Francisco Railroad Co. v. Sanderson, *supra,* note 5, 54 So. at 888.

[14]*Supra* note 6.

[15]190 Miss. 572, 1 So. 2d 216 (1941).

[16]Dunbaben v. Castles Ice Cream Co., 103 N. J. L. 427, 135 A. 886 (1927).

[17]In the instant case, the jury found that the plaintiff was not contributorily negligent. PROSSER, TORTS, 473 (1st ed. 1941); Laski, *The Basis of Vicarious Liability,* 26 Yale L. J. 105 (1910).

[18]PROSSER, TORTS, 473; Laski, *The Basis of Vicarious Liability,* 26 Yale L. J. 105. *ous Liability,* 26 Yale L. J. 105.

[19]Vicksburg Gas. Co. v. Ferguson, 140 Miss. 543, 106 So. 258 (1925).

[1]KY. REV. STAT. § 188.020—188.030 (1953).

[2]201 F. 2d 582 (6th Cir. 1950).

Use of the state highway resulting in process being served on the motorist under a non-resident statute did not amount to a waiver of federal venue rights[3] by implied consent. *Olberding v. Illinois Cent. R. Co.*, — U. S. —, 74 S. Ct. 83 (1953).

For many years the Supreme Court has held that service under non-resident statutes does not in any way violate the defendant's constitutional rights.[4] Similar provisions have been adopted by the forty-eight states and the District of Columbia.[5]

In *Hess v. Pawloski*,[6] decided in 1927, the courts found by use of a fiction that venue had been waived by an implied consent of the defendant by operating a vehicle on the state highways.[7] This set the trend in later years to be less restrictive. The case of *Neirbo v. Bethlehem Shipbuilding Corp.*[8] held that the designation of an agent for service of process, which was a condition precedent for the defendant to obtain license to do business in the state, was a waiver of venue privilege. This decision, a firm move in allowing a waiver of venue through conduct, has been widely accepted.

Following the *Neirbo* case, it would have seemed reasonable to assume that venue would be waived by service of process under the non-resident statute. The text writers have agreed that this was the logical expectancy,[9] and in the dissent of the instant case Justice Reed took note of the trend of the Federal District Courts by saying, "District Courts have consistently ruled that the appointment of an agent for service of process by driving on state highways is a waiver of federal venue."[10]

Those decisions which have not followed the trend and weight of authority,[11] distinguish the *Nierbo* case on the grounds that, in that case, actual consent had been given by the corporate defendant when it obtained a license to do business in the state in accordance with the state statute, while the individual motorist gives no actual consent under a non-resident motorist statute. It may be noted that most non-resident motorist statutes do not require any actual designation of a state agent by the motorist.

The assumption of the text writers and the rulings of the District Courts were not taken as being the correct view, and the Supreme Court saw fit to follow the reasoning of the minority in the subject case. It is not easy to see a valid distinction between the non-resident corporation statute in the *Neirbo* case and the non-resident motorist statute in the instant case, but a distinction has been made and must be recognized.

Although the parties may still sue in the district where the plaintiff resides or where the defendant resides, the *Olberding* decision now makes a suit in the court of the state in which the action arose the most desirable when both defendant and plaintiff are non-residents. Expense and inconvenience are at a minimum while there is no danger of discrimination. However, there is one possibility that should be considered. The defendant may remove to the Federal Court, but scarcely any benefit will accompany the removal.

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[3]28 U.S.C.A. § 1391 (a).

[4]Hess v. Pawloski, 274 U. S. 352 (1927).

[5]Knopp v. Anderson, 71 F. Supp. 823, 836 (N. D. Iowa 1947) reached this conclusion after a survey by the court. See also Miss. Code § 9352-61 (1942).

[6]*Supra* note 4.

[7]The Supreme Court had ruled for over a decade prior to Hess v. Pawloksi, supra, note 4, that a statute requiring mandatory registration by non-resident motorists was constitutional. Kane v. New Jersey, 242 U. S. 160 (1916).

[8]308 U. S. 164 (1939).

[9]3Moore's Fed. Prac. 2128 (2d ed. 1948); 1 Barron and Holtzoff, Fed. Prac. and Pro. 170 (Rules ed. 1950); 6 Ohlinger, Fed. Prac. 48 (Rev. ed. 1954).

[10]Olberding v. I.C.R.R., — U. S. —, 74 S. Ct. 87 (1953). See footnote 2 in the dissenting opinion for a list of cases supporting this statement.

[11]Martin v. Fischbach Trucking Co., 183 F. 2d 53 (1st. Cir. 1950); McCoy v. Siler, 205 F. 2d 498 (3rd Cir. 1953).

It must be remembered that in all cases dealing with service of process under a non-resident motorist statute, state laws are interpreted. Since *Erie Railway Co. v. Tompkins*,[12] a question of conflicts of law always arises when recognition of a state law is involved, but it would be doubtful if a valid argument could be made that venue is anything other than procedural law. At least one court has refused this argument and said the doctrine of the *Erie* case is inapplicable.[13]

The most favorable effect of this decision is that at last the Supreme Court has settled a long-standing conflict among the lower federal courts by declaring that the fiction of implied consent cannot be used to waive the federal venue rights of a non-resident motorist.

William A. Wiltshire

EVIDENCE—JUDICIAL NOTICE OF RADAR SPEED METERS

Beck was tried and convicted for violation of a municipal speed law. Testimony of policemen observing the speed of the car and the record of a radar speed meter were given in evidence. On appeal the conviction was reversed even though the court said that the mere testimony of the policeman was sufficient to convict the defendant. HELD: Because the accuracy of such radar speed meters is not of general knowledge, the court cannot take judicial notice of the accuracy of such a device. *Buffalo v. Beck*, 130 N.Y.S. 2d 354 (1954).

Courts may take judicial notice of what is, or ought to be generally known within their jurisdiction. There are three material requisites: "(1) The matter must be of common and general knowledge. (2) It must be 'known', that is, well established and authoritatively settled. (3) It must be known within the limits of justice."[1] The New York court in the instant case seems to have made iron-clad the established principle that "the power of judicial notice must be exercised with great caution by the courts."[2]

Since 1926, courts have generally taken judicial notice of the accuracy of "Bloodhound Testimony."[3] Later courts judicially noticed, as infallible means of identification, fingerprints,[4] footprints,[5] and palmprints.[6] Some of the more recent decisions show courts going so far as to hold it to be a matter of common knowledge that many houses have porches without railings,[7] that the useful life of a wooden grandstand is 15 years,[8] and that in modern automobiles "it is necessary to mount 'curb finders'

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[12]304 U. S. 64 (1938).

[13]Blunda v. Craig, 74 F. Supp. 9 (E.D. Mo. 1947). The Court explained that the Erie Doctrine (which says that state law shall control over federal law where the matter is of substantive nature, and Congress has not acted) will not apply to a venue question which the Court said was a procedural question.

[1]Bettencourt v. State, — Cal. —, 266 P. 2d 201 (1954). Judicial notice "does not mean knowledge which they [the judges] individually possess by reason of personal investigation and research, but matters of common notoriety which because of such notoriety, they share or should share in common with the public." Amos v. Mosley, 74 Fla. 555, 77 So. 610 (1917). "Courts may judicially notice scientific facts which have been well established by authoritative scientists and are generally accepted as irrefutable by living scientists." It is not necessary that the judge or all the people in the locality understand the accepted scientific fact. Nicketta v. National Tea Co., 338 Ill. App. 159, 87 N.E.2d 30 (1949).

[2]Poke v. Peerless Foundry Co., — Ind. —, 119 N.E. 2d 905 (1954).

[3]Copley v. State, 153 Tenn. 189, 281 S.W. 460 (1926).

[4]Murphy v. State, 184 Md. 70, 40 A.2d 239 (1944).

[5]State v. Rogers, 233 N.C. 390, 64 S.E.2d 572 (1951).

[6]State v. Lapan, 101 Vt. 124, 141 Atl. 686 (1928).

[7]Landes v. Barone, 283 App. Div. 207, 127 N.Y.S. 2d 112 (1954).

[8]McFerran v. Heroux, — Wash. —, 269 P. 2d 815 (1954).

on the right hand side of such automobiles in order to prevent damage to lower parts of the bodies and fenders in parking."[9] The New York court allowed "drunkometer" evidence without proof of accuracy.[10]

It has been established in other courts that if the jury found the radar speed meter was operating properly, the defendant could be convicted on that evidence alone.[11] The Kentucky Court of Appeals reasoned that if tested speedometers on police officers' motorcycles may be accepted as accurate, when it is common knowledge that many factors affect the operation of the instrument to some extent, surely a record of a radar speed meter fulfilling the function for which it was designed is sufficient for conviction.[12] However, a New York court, when considering the admissibility of radar in *People v. Offerman*,[13] held that evidence composed solely of a radar meter record was not competent to convict a defendant, since proof of accuracy would be hearsay. The New Jersey court ruled, however, that proof of accuracy was not hearsay.[14]

The result of the present case could be expected in New York after the *Offerman* case, which stated that "the operation of this device is not a practical application of scientific facts which are generally known or ought to be known."[15] In defending its stand the court said that electronics brings us television, long range shore protection, guided missiles and, perhaps, some day push button war—but not "push button justice unless and except such justice is surrounded by the long-established rules of evidence."[16]

In a case such as the present one, one is prone to agree that "to require that a judge should affect a cloistered aloofness from facts that every other man in court is fully aware of, and should insist on having proof on oath of what as a man of the world he knows already better than any witness can tell him is a rule that may easily become pedantic and futile."[17] Wigmore encourages liberal use of judicial notice to avoid failures in justice caused by "the artificial importance of judicial proceedings."[18] In accepting radar speed meters for determining speed as well as in accepting polygraphic truth tests for determining the truth, "in the procedural field the question should *not* be: What have the courts of another era done? It should be: Does the new method give reliable results? If so, the courts should wear out the novelty of the new method by using it."[19]

Within recent years Mississippi has begun using radar speed checkers on the highways. It is hoped that Mississippi courts will take a realistic view when dealing with such evidence.

Mary Libby Bickerstaff

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[9]Lee v. Holland, — Mo. —, 258 S.W. 2d 30 (1953).

[10]People v. Spears, 201 Misc. 666, 114 N.Y.S. 2d 869 (1952). In following that decision, the New York court adopted the quotation: "This court is of the opinion that we should favor the adoption of scientific methods for crime detection, where the demonstrated accuracy and reliability has become established and recognized. Justice is truth in action, and any instrumentality, which aids justice in ascertainment of truth, should be embraced without delay." People v. Kovacik, — Misc. —, 128 N.Y.S.2d 492 (1954).

[11]State v. Moffitt, 100 A.2d 778 (Del. 1953); Carrier v. Commonwealth, 252 S.W.2d 633 (Ky. 1951); People v. Sarver, 205 Misc. 523, 129 N.Y.S.2d 9 (1954); Laibowitz v. Katz, 205 Misc. 522, 129 N.Y.S.2d 8 (1954); People v. Torpey, 204 Misc. 1023, 128 N.Y.S.2d 864 (1954).

[12]Carrier v. Commonwealth, 242 S.W.2d 633 (Ky. 1951).

[13]125 N.Y.S.2d 179 (1953).

[14]State v. Dantonio, 31 N.J. Super Ct. 105, 105 A. 2d 633 (Ky. 1951).

[15]*Supra,* note 13.

[16]*Ibid.*

[17]9 WIGMORE, EVIDENCE sec. 2583 (3rd Ed. 1940).

[18]*Ibid.*

[19]Wicker, *The Polygraphic Truth Test and the Law of Evidence,* 22 TENN. L. REV. 711, at 725-26 (1953).

CONSTITUTIONAL LAW—BOXING AND INTERSTATE COMMERCE

The United States Government filed a complaint alleging that the defendants'[1] business—the promotion of professional championship boxing contests on a multistate basis, coupled with the sale of rights to televise, broadcast, and film the contests for interstate business—restrained and monopolized "trade and commerce" in violation of the Sherman Antitrust Act. HELD: Boxing is subject to the provisions of the Sherman Antitrust Act[2] and whether an exemption from the antitrust laws should be granted to businesses based on professional sports is an issue for Congress, not the courts, to decide. *United States v. International Boxing Club of New York*, 75 S. Ct. 259 (1955).

Prior to the filing of the Government's complaint in the instant case, the question of whether professional boxing as such was subject to the antitrust laws had never been considered by the Supreme Court.[3] *Federal Baseball Club of Baltimore v. National League*,[4] decided in 1922, held that baseball was essentially local and not interstate. Mr. Justice Holmes stated that ". . . personal effort not related to production is not a subject of commerce."[5] Therefore, since baseball was neither interstate nor commerce, the federal antitrust laws did not apply. Since the Holmes decision, radio,[6] television,[7] and motion pictures[8] (held to be subjects of interstate commerce) have come to play an important role in baseball. However, recently in *Toolson v. New York Yankees, Inc.*[9] the Supreme Court "without re-examining the underlying issues" re-affirmed the *Federal Baseball* case insofar as that decision determined that Congress had no intention of including baseball within the scope of the antitrust laws. Necessarily, these two baseball cases are limited to their facts, and it seems to leave the status of baseball undetermined in other contexts.[10]

Thus, behind the screen erected in the *Federal Baseball* case, baseball and all other professional sports were protected from antitrust action for twenty-seven years.[11] That a boxing match, like the showing of a motion picture or the performance of a vaudeville act,[12] is a local affair cannot be disputed; but it is held that this factor is not determinative. If the business is operating in interstate commerce or if the business imposes illegal restraints on such commerce, then the provisions of the Sher-

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[1]The corporate defendants were International Boxing Club of New York, Inc., International Boxing Club, and Madison Square Garden Corporation. The individual defendants, James D. Norris and Arthur M. Wirtz, together with Madison Square Garden Corporation, own 80% of the stock of International Boxing Club of New York, Inc. and International Boxing Club.

[2]26 STAT. 208 (1890), 15 U.S.C. §§ 1-7 (1946), as amended, 50 STAT. 693 (1937).

[3]Shall v. Henry, 211 F. 2d 226 (7th Cir. 1954), held that the antitrust laws are inapplicable to athletic contests such as boxing matches.

[4]259 U.S. 200 (1922). For a general discussion of the law of baseball, see Notes, 46 YALE L. J. 1386 (1937); 19 NOTRE DAME LAW. 262 (1944); 32 VA. L. REV. 1164 (1946).

[5]Federal Baseball Club of Baltimore v. National League, *supra* note 4 at 209.

[6]Federal Radio Commission v. Nelson Bros. Bond and Mortgage Co., 289 U.S. 266 (1933).

[7]Allen B. Dumont Laboratories v. Carroll, 184 F. 2d 153 (3rd Cir. 1950).

[8]Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930).

[9]74 S. Ct. 78 (1953), 25 MISS. L. J. 270 (1954). Here, a baseball player was placed on the ineligible list and all the teams were prevented from employing him until he was removed from the list. In a suit for damages by the player, the Supreme Court held that baseball was not subject to the Sherman Act.

[10]It appears that other professional sports are by no means guaranteed immunity. Recently, a federal district court held that the provisions of the by-laws of the National Football Ieague, which restricted the telecasting of certain games, violated the Sherman Act. United States v. National Football League, 166 F. Supp. 319 (E.D.Pa. 1953).

[11]See Ring v. Spira, 148 F. 2d 647 (2nd Cir. 1945); Gardella v. Chandeler, 79 F. Supp. 260 (S.D.N.Y. 1948).

[12]Hart v. B. F. Keith Vaudeville Exchange, 262 U.S. 271 (1923).

man Act apply.[13] Trade or commerce has been given a very liberal interpretation by the courts and is now held to include even medical services to members of a health cooperative[14] and insurance underwriting.[15] Also, it seems that once interstate commerce is established, the Sherman Act may be applied even to local restraints on such commerce.[16] In the instant case, the Government alleged that 25% of the revenue from professional boxing was derived from interstate operations through the sale of radio, television, and motion picture rights. The defendants argued that they were exempt from the Sherman Act because under the doctrine of stare decisis, the *Federal Baseball* and *Toolson* cases immunized all businesses involving exhibitions of an athletic nature. The Court refused to adopt this argument, stating that these decisions did not hold that *all* businesses based on professional sports were outside the scope of the antitrust act. The court in the subject case recognized the issue to be ". . . not whether a previously granted exemption should continue, but whether an exemption should be granted in the first place." In 1951, four bills,[17] introduced in Congress but never passed, asked for an exemption of all organized professional sports and incidents thereto. The Court said that such a broad exemption would have virtually repealed the antitrust laws.[18]

If baseball, boxing, and other professional sports must be run along monopolistic lines, perhaps the wisest course is to follow the rationale of Holmes and bar the application of the federal law. However, if there are harmful monopolies in the professional sports and the harm can be cured without ruin, it is submitted that professional sports should certainly be forced to comply with the antitrust laws. Following this line of reasoning, the Court in the case under consideration may have felt that professional boxing, which is controlled by relatively few individuals, was more harmful to the public than a sport such as baseball, which is composed of major leagues represented by teams from the metropolitan cities and minor leagues with teams in practically every state in the Union. "But to conclude categorically that a sport is not trade or commerce is a mere statement of negations."[19] It seems, however, that a professional baseball or football game should not be distinguished legally from that of a professional boxing match.

James E. Hardin

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[13]26 STAT. 208 (1890), 15 U.S.C. §§ 1-2 (1946), as amended, 50 STAT. 693 (1937).
[14]American Medical Association v. United States, 317 U.S. 519 (1945).
[15]United States v. S. E. Underwriters Ass'n., 322 U.S. 533 (1944).
[16]United States v. Women's Sportwear Mfg. Ass'n., 336 U.S. 460 (1949).
[17]H.R. 4229, 4230, 4231, 82d Cong., 2d Sess. (1951); S.B. 1526, 82d Cong., 2d Sess. (1951).
[18]Less than a year after the decision in the Federal Baseball case, the Court put the theatrical business on notice that the Federal Baseball case could not be relied upon as a basis for exemption from the antitrust laws. Hart v. B. F. Keith Vaudeville Exchange, *supra* note 12. See also United States v. Shubert, 75 S. Ct. 277 (1955).
[19]Neville, *Baseball and the Antitrust Laws*, 16 FORD. L. R. 208 (1947).

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